This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.

+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.

+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.

+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at `http://books.google.com/`

STANFORD UNIVERSITY LIBRARY

The Law School

JSN
LRO
KWT

A

TREATISE

ON THE

CONSTRUCTION OF THE STATUTES,

13 Eliz. c. 5. and 27 Eliz. c. 4.

RELATING TO

VOLUNTARY AND FRAUDULENT

CONVEYANCES,

AND

ON THE NATURE AND FORCE

OF

DIFFERENT CONSIDERATIONS

TO SUPPORT DEEDS AND OTHER LEGAL INSTRUMENTS,

IN THE

COURTS OF LAW AND EQUITY.

2617

By WILLIAM ROBERTS,

LINCOLN'S INN.

LONDON:

PRINTED BY A. STRAHAN,

LAW-PRINTER TO THE KING'S MOST EXCELLENT MAJESTY,

FOR J. BUTTERWORTH, FLEET-STREET.

1800.

370595

TANFORD LIBRARY

TO

THE RIGHT HONOURABLE

JOHN LORD ELDON,

BARON OF ELDON

IN THE COUNTY PALATINE OF DURHAM,

LORD CHIEF JUSTICE

OF THE COURT OF COMMON PLEAS,

&c. &c. &c.

THIS TREATISE

IS,

WITH HIS LORDSHIP'S PERMISSION,

AND

WITH SENTIMENTS

OF RESPECT AND ADMIRATION,

HUMBLY DEDICATED.

PREFACE.

THE want of opportunities of communication, and of the advantage of learned aſſiſtance, which the urgency of circumſtances has precluded the Writer of the following pages from enjoying, were good reaſons to deter him from his undertaking, but are no excuſe for his failure in the execution. He muſt not, therefore, hope to ſhelter himſelf under ſuch an apology. He may perhaps, however, incline his Readers to deal more favourably with his errors by directing their thoughts to the natural difficulty of the ſubject, and the floating ſtate of the opinions and judgments reſpecting it. His choice has not afforded him the pleaſure of expatiation in a province decorated and ſyſtematized by learning and ability. It is new and adventurous, and points to a path of enquiry, in which there are few guides to direct diligence, and but

little preciſion to aſſure the judgment. It is upon the difficulty, therefore, of his ſubject, that the writer founds his claim to the benignity of the profeſſion. He has felt the impoſſibility of extracting pure ſcience and perfect ſyſtem from the opinions of great men pronounced at diſtant periods, under the influence of the different modes of thinking, which ſocial and political changes produce, and obſcured by the very imperfect manner in which it has been often their lot to be reported. It has been his endeavour, therefore, firſt, to vindicate to himſelf the right of free examination, by diſplaying the contradictorineſs of great opinions, and then, from the reaſonings and data which thoſe opinions furniſh compared with the general maxims of our Common Law, to draw out a reſult which might connect in correſpondence and conſiſtency the greater and more venerable part of our legal authorities.

While we cannot but lament that the propenſity of great talents to lead rather than to follow, and the impulſe of compaſſion for individual hardſhip have in time paſt produced ſome inconſiſtency and derange-

derangement in the ſyſtem of our laws, it is a pleaſure to obſerve in the preſent diſpoſition of our Judges, no leſs expoſed to the irregular influences of feeling and genius, a manly obſequiouſneſs to fundamental maxims, and a reſolution to enſure the permanence by maintaining the conſiſtency of legal principles, and placing them above the reach of tranſitory faſhions and opinions.

The Reader will not be detained by any analyſis of the plan of the following ſheets, further than a mere table of contents, as a running title has been added to point out the general matter of each page; but it is felt neceſſary to direct attention to the note in Page 341, where the caſe of *Marſhall* v. *Rutton* is mentioned as at that moment depending before the twelve Judges, a circumſtance of which the Writer had only been apprized ſince the preceding ſheet had been ſent to preſs. Within theſe few days he has been informed that the Judges have pronounced their unanimous opinion by the mouth of the Chief Juſtice of the King's Bench. Mr. Durnford has been ſo obliging as to favour the writer

with the manuſcript of his intended report of the judgment. The peruſal, which could not but be tremblingly wiſhed for after the diſcuſſion which the ſubject had undergone in the thirteenth Section of the third Chapter of this Treatiſe, afforded him a gratification as great as his reſpect for thoſe high characters who proved by their deciſion that his humble thoughts were not erroneous.

An opportunity here preſents itſelf of introducing the ſubſtance of a caſe juſt determined in the Court of K. B. and which is illuſtrative and confirmatory of ſome of the moſt important doctrines contained in this volume. Vid. 8 T. R. 521. *Nunn* and *Ladbrooke*, aſſignees of W. Wilſmore, againſt *Mary Wilſmore*, executrix of T. Wilſmore.

W. Wilſmore, being indebted to T. Wilſmore, the defendant's deceaſed huſband, in 300 *l.* and to S. B. in 130 *l.* made a bill of ſale of his effects to S.B. dated 20th July 1792, as a ſecurity for thoſe debts. The effects thus aſſigned were thereupon ſold by S. B. who retained his own debt out of the produce; and in November

vember 1792 paid over the remainder (being the money for which the action was brought) to T. Wilſmore, on account of his debt. T. Wilſmore had received a fortune of about 1,800*l.* with the defendant his wife, (his own property having been about 200*l.* only); but being a diſſipated man had contracted a great number of debts. In September 1793 T. Wilſmore and the defendant his wife agreed to ſeparate, which agreement was in the month of October following carried into execution by an indenture, whereby, after reciting that the defendant had been ill treated by her huſband, and that, in order to put an end to their differences, and to make ſome proviſion and maintenance for her, T. Wilſmore had propoſed that on being paid the ſum of 200*l.* for his own ſeparate uſe, he would quit the farm at P. and transfer his farming ſtock, &c. and his houſhold furniture, &c. and all his right and intereſt in the leaſe of his farm, and the effects thereon, and all debts due to him, unto H. and T., and that the huſband and wife had beſought H. to advance to T. Wilſmore the ſaid ſum of 200*l.* which he had conſented to do upon having a ſecu-

a ſecurity as therein mentioned, the ſaid T. Wilſmore, in conſideration of the agreement and the 200 *l.* advanced by H., aſſigned all his property and effects, according to the agreement, to H. and T. upon truſt, that H. ſhould reimburſe himſelf the ſaid 200 *l.*, and upon further truſt, that the ſaid truſtees out of the produce of the farm, or by ſale of the property and effects aſſigned to them, ſhould diſcharge all or ſuch part or parts of the debts owing by the ſaid T. Wilſmore, and which he had given in an account of, as they in their diſcretion ſhould think proper; and upon further truſt that they ſhould pay and apply the overplus to Mary Wilſmore for her ſeparate uſe and benefit. In purſuance of this deed T. Wilſmore left the farm, and died in the year 1794 inteſtate. The truſtees entered upon their truſt, ſold the effects, and paid the expences of the ſale, &c. and no ſuch account, as mentioned in the deed, having been given by the deceaſed, they advertiſed for all his creditors to meet, that his debts might be diſcharged, and paid all ſuch creditors as ſent in their demands 20*s.* in the pound. After which there remained a balance of

329*l.*

329*l.* 19*s.* 1*d.* excluſive of the value of the leaſe, and certain articles of furniture and ſtock to the amount of 111*l.* which had been bought in by one of the truſtees at the auction, though not paid for, and which remained in defendant's poſſeſſion on the farm at the time of the huſband's death, and alſo at the commencement of the action. The leaſe, which was of the value of 500*l.* had been granted to the deceaſed T. Wilſmore jointly with his father, one of the truſtees, and it contained the uſual covenant and proviſo againſt aſſignment. The defendant's huſband, T. Wilſmore, ſtocked and carried on the farm till the deed of ſeparation. The defendant reſided on the farm conſtantly from the time of the ſeparation, and received the benefit of the produce thereof from time to time from the truſtees. On the 23d of November 1793, a commiſſion of bankrupt iſſued againſt W. Wilſmore, founded on an act of bankruptcy committed previouſly to the bill of ſale to T. Wilſmore and S. B.; and the aſſignees brought an action of aſſumpſit for money had and received by the defendant's teſtator to their uſe upon the following grounds, viz. that

by the relation of the commiſſion, all the intermediate acts of the bankrupt in diminution of his eſtate ſince the act of bankruptcy were avoided, and conſequently the particular aſſignees under the above mentioned bill of ſale became accountable for the value of the property conveyed by it to the general creditors; and that while under ſuch liability T. Wilſmore made the aſſignment by indenture above mentioned upon the occaſion of the ſaid ſeparation between him and the defendant his wife. The defendant, as being in poſſeſſion under ſuch aſſignment to her truſtees, was ſued by the plaintiffs as executrix *de ſon tort* agreeably to the rule diſcuſſed in page 593 *et ſeq.* of this volume; to which, beſides other pleas, ſhe pleaded *plene adminiſtravit.* The caſe was tried by the late Mr. Juſtice Buller, at the Lent Aſſizes for Eſſex, and a verdict was taken for the plaintiffs for the amount of the money paid over by S. B. to T. Wilſmore deceaſed, ſubject to the opinion of the Court upon the caſe as ſtated above.

Two points were made by the bench:

1ſt, Whe-

1ſt, Whether the deed, whereby the effects of T. Wilſmore were conveyed for the purpoſes therein mentioned, was actually fraudulent.

2. Whether it was fraudulent by being *voluntary*, for if it were voluntary, it was ſaid, the law would *infer* fraud (*a*).

That it was not actually fraudulent the Chief Juſtice thought perfectly clear. Conſider, ſaid his Lordſhip, what was the condition of the parties; the huſband and wife were living together on bad terms: the former was ſquandering away the property, and ill treating the wife; and in order to prevent his ill uſing her in future, and to prevent her inſtituting a ſuit in the ſpiritual court (*b*), and to put an end to all differences, and in conſideration of 200 *l.* *advanced* by one of the truſtees, this deed was executed. His Lordſhip obſerved, that it had been ſaid that it was merely a loan of the 200 *l.* by the truſtee; but he did not ſee why that was not a

(*a*) Vid. this Treatiſe, page 395. *et ſeq.*

(*b*) Id. page 343.

con-

conſideration to ſupport the deed. In deciding queſtions of this ſort, continued his Lordſhip, the courts have always diſavowed enquiring whether the conſideration were equivalent. They will not weigh it in very nice ſcales, if it be a fair and honeſt tranſaction. Then what was done for this *valuable* conſideration? inſtead of ſending the wife into the Spiritual Court for alimony (*c*), a proviſion was firſt made for the huſband himſelf; he was to receive 200 *l.* the amount of his own property; then proviſion was to be made for all his juſt debts; and laſtly, the reſidue was to be a proviſion for his wife, ſo ill uſed, and ſo *deprived of an appeal* to the laws of her country for alimony. I admit, ſaid his Lordſhip, that *if this were a voluntary deed, the law ſays it is fraudulent* (*d*); but I conſider this deed as having been made for valuable conſideration and not voluntary. I read over thoſe parts of the deed not ſet forth, to ſee whether or not the truſtees had *indemnified the huſband againſt the future debts of the wife* (*e*); and

(*c*) Vid. this Treatiſe, page 343.
(*d*) Id. ſect. 2. ch. 4.
(*e*) Id. p. 347.

though

though the deed contains no covenant of that kind, much was *to be done by the truſtees* (*f*); they were to enter upon the farm, and to be at the expence of carrying it on; very ſmall conſiderations have, ſometimes, been holden ſufficient to give validity to a deed; where, in framing family ſettlements, limitations are made to the diſtant branches of the family, ſuch remainders are not conſidered as voluntary, if the object of the parties making the ſettlement were fair and honeſt (*g*). But here there was an immediate conſideration; independently of the proviſion for the huſband, he was relieved from the conſequences of a ſuit in the Spiritual Court. Therefore I am of opinion, concluded his Lordſhip, that this deed was not only a fair and conſcientious deed, but alſo, that there was a good conſideration for it, which delivers it from all obligations by thoſe who now wiſh to impeach it, and conſequently that the plaintiffs cannot recover in this action. Of which opinion were the reſt of the Judges, and upon ſimilar reaſons.

(*f*) Vid. this Treatiſe, p. 323.
(*g*) Id. ch. 2. ſect. 4, 5, 6, 7, 8.

The

The Writer has adopted this caſe (which has only come to his knowledge ſince the whole of his Book has been printed) by way of introduction, as the opinion of the Lord Chief Juſtice embraces a very conſiderable number of the points, which had been attempted to be diſcuſſed in the following ſheets.

One word only remains to be added here. The Writer ventures to announce his intention of proſecuting his inveſtigations through all the branches of his ſubject, which have yet eſcaped the zealous reſearches of methodical induſtry, among which he propoſes to include an arrangement of the deciſions upon the law of *fraudulent deviſes*, and the *great ſtatute of frauds and perjuries*. Whether or not he ſhall perſevere in what he has with great timidity begun muſt depend upon the credit his preſent Work may find with the profeſſion.

Lincoln's Inn,
Eaſter Vacation 1800.

A TABLE OF THE CONTENTS.

CHAP. I.

PAGE.

Sect. 1. PRELIMINARY obſervations. 1

SETTLEMENTS. 17

Debts precedent and ſubſequent. 19

2. *Intent to deceive.* 30

Notice to the purchaſer. 39

3. *Perſons benefited by the ſtatutes.* 46

4. *Voluntary conveyances, how far fraudulent.* 61

Nature and effect of the valuable conſideration. 67

5. *What degree of inducement is a ſufficient conſideration to ſupport a ſettlement.* 74

6. *Origin of uſes.* 84

Conſiderations to raiſe uſes. 85

——— *ſupport promiſes.* 93

CHAP. II.

Sect. 1. Conſideration of marriage. 101

2. *Settlements partially valid.* 112

3. *Conſiderations, and relief in equity.* 116

4. *Extent of the marriage conſideration.* 123

5. *Acceſſory conſideration where parents join in the ſettlement.* 139

PAGE.

Sect. 6. *Of the reciprocity of interest necessary to ground the consideration.* 153
7. *Collateral limitations.* 162
Interest of the husband under a settlement. 171
8. *Limitations to the heirs of the grantor.* 175

CHAP. III.

Sect. 1. Settlements after marriage. 187
Construction more favourable to purchasers than to creditors. 189
Settlements after marriage void. 193
2. *Assurances upon record.* 205
3. *Settlements after marriage void.* 213
4. *Settlements after marriage grounded on prior agreements.* 218
5. *Same subject.* 236
6. ——— *must be conformable to such prior agreements.* 245
7. *Settlements after marriage founded on fresh agreements.* 249
8. *Settlements after marriage founded on new considerations.* 253
9. *Settlements supported by contracts between husband and wife.* 262
10. *Settlements after marriage of the wife's trust-property.* 279
11. *Of assignments of the wife's trust-property.* 291
12. *Of the husband's power of disposition over* terms of years *held in trust for married women.* 299
13. *Settlements after marriage grounded on voluntary separation.* 316
14. *Settlements made previous to a second, upon children of a first marriage.* 348

CHAP. IV.

PAGE.

Sect. 1. Operation of the ſtatutes upon ſimple conveyances. 366
Purchaſer, how qualified to take advantage of ſtatute 27 *Eliz.* 368
2. *Conſtruction of ſtatute* 13*th and* 27*th Eliz. as to conveyances merely voluntary.* 395
Voluntary gifts of money. 420
Incapacity of the donor. 425
——— *how far it repels the preſumption of fraud.* 426
Conveyances for payment of debts. 430
3. *Charitable donations.* 436
4. Donatio cauſâ mortis. 442
Conveyance in expectation of death. 444
5. *The conſideration of natural love.* 448
Debts founded in maleficio. 456
—— *ariſing collaterally.* 459
6. *Purchaſers in the names of third perſons.* 463
Conveyance by the huſband of an executrix. 467
Conveyances by perſons entitled de jure alieno. 469
7. *Voluntary executions of powers of appointment.* 473
8. ——— *bonds.* 478
9. *Judgments by confeſſion.* 489
10. *Conſiderations ariſing* ex poſt facto. 495

CHAP. V.

Sect. 1. *Antipathy to fraud characteriſtic of the common law.* 520
Remedies againſt fraud at the common law. 522
2. ——————— *in equity.* 526

Sect. 3.

PAGE.

Sect. 3. *All ſtatutes againſt fraud equitably and beneficially conſtrued.* 542

Remedy, how advanced by the ſtatutes. 544

Badges of fraud. 546

——— *poſſeſſion after conveyance.* 549

——— ——— *retained after execution.* 573

——— *conveyance pending an action.* 575

——— ——— *to avoid forfeiture.* 583

4. *Fraud not helped by circuity.* 587

5. *How the ſtatutes work to the benefit of the party protected.* 591

6. *Lands fraudulently aliened will deſcend as aſſets.* 597

CHAP. VI.

Sect. 1. 2. 3. *Fraudulent powers of revocation.* 611

CHAP. VII.

Sect. 1. *Voluntary deeds, how far binding on the party and his repreſentatives.* 641

A

TREATISE

ON

FRAUDULENT CONVEYANCES,

&c. &c. &c.

CHAP. I.

SECTION I.

IT was an obſervation of Lord Matſfield (1), that the principles and rules of the common law, as now univerſally known and underſtood, are ſo ſtrong againſt Fraud in every ſhape, that the common law was calculated to attain every end propoſed by the ſtatutes of 13 El. c. 5. (*a*), and (1) Cowper, 434.

(*a*) 13 Eliz. c. 5. 'For the avoiding and abolishing of feigned, covinous, and fraudulent feoffments, gifts, grants, alienations, conveyances, bonds, ſuits, judgements and executions, as well of lands and tenements as of goods and chattels, more commonly uſed and practiſed in theſe days than hath been ſeen or heard of heretofore.' Made perpetual 29 Eliz. c. 5.

and 27 El. c. 4. (*b*). And in *Paunce-foot*'s case, cited in *Twyne*'s case, determined

---

'heretofore: which feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgements and executions have been and are devised and contrived of 'malice, fraud, covin, collusion or guile, to the end, 'purpose and intent, to delay, hinder, or defraud creditors and others of their just and lawful actions, suits, 'debts, accounts, damages, penalties, forfeitures, heriots, 'mortuaries and reliefs, not only to the let or hinderance of the due course and execution of law and 'justice, but also to the overthrow of all true and plain 'dealing, bargaining and chevisance between man and 'man, without the which no commonwealth or civil 'society can be maintained or continued:

'2. Be it therefore declared, ordained and enacted, 'by the authority of this present parliament, That all 'and every feoffment, gift, grant, alienation, bargain 'and conveyance of lands, tenements, hereditaments, 'goods and chattels, or of any of them, or of any lease, 'rent, common or other profit or charge out of the same 'lands, tenements, hereditaments, goods and chattels, or 'any of them, by writing or otherwise, and all and 'every bond, suit, judgement and execution, at any time 'had or made sithence the beginning of the queen's 'majesty's reign that now is, or at any time hereafter 'to be had or made, to or for any intent or purpose 'before declared and expressed, shall be from henceforth 'deemed and taken (only as against that person or persons, his or their heirs, successors, executors, administrators and assigns, and every of them, whose actions,

mined in the exchequer chamber, Michaelmas 35 & 36 Eliz., where Pauncefoot, being

---

'ſuits, debts, accounts, damages, penalties, forfeitures, 'heriots, mortuaries and reliefs, by ſuch guileful, covi-'nous or fraudulent devices and practices, as is afore-'ſaid, are, ſhall or might be in any wiſe diſturbed, 'hindred, delayed, or defrauded) to be clearly and 'utterly void, fruſtrate, and of none effect; any pre-'tence, colour, feigned conſideration, expreſſing of uſe, 'or any other matter or thing to the contrary notwith-'ſtanding.

'3. And be it further enacted by the authority afore-'ſaid, That all and every the parties to ſuch feigned, 'covinous or fraudulent feoffment, gift, grant, aliena-'tion, bargain, conveyance, bonds, ſuits, judgements, 'executions and other things before expreſſed, and 'being privy and knowing of the ſame, or any of them; 'which at any time after the tenth day of *June* next 'coming ſhall wittingly and willingly put in ure, avow, 'maintain, juſtify or defend the ſame, or any of them, 'as true, ſimple, and done, had or made *bona fide* and 'upon good conſideration; or ſhall alien or aſſign any 'the lands, tenements, goods, leaſes or other things 'before-mentioned, to him or them conveyed as is afore-'ſaid, or any part thereof; ſhall incur the penalty and 'forfeiture of one year's value of the ſaid lands, tene-'ments and hereditaments, leaſes, rents, commons, or 'other profits, of or out of the ſame; and the whole 'value of the ſaid goods and chattels; and alſo ſo much 'money as are or ſhall be contained in any ſuch covin-

being indicted for recuſancy for not coming to divine ſervice, and intending to fly beyond

---

'ous and feigned bond; the one moiety whereof to be 'to the queen's majeſty, her heirs and ſucceſſors, and 'the other moiety to the party or parties grieved by 'ſuch feigned and fraudulent feoffment, gift, grant, 'alienation, bargain, conveyance, bonds, ſuits, judge-'ments, executions, leaſes, rents, commons, profits, 'charges and other things aforeſaid, to be recovered in 'any of the queen's courts of record by action of debt, 'bill, plaint or information, wherein no eſſoin, pro-'tection or wager of law ſhall be admitted for the de-'fendant or defendants; and alſo, being thereof lawfully 'convicted, ſhall ſuffer impriſonment for one half year 'without bail or mainprize.

'4. Provided always, and be it further enacted by the 'authority aforeſaid, That whereas ſundry common 'recoveries of lands, tenements and hereditaments have 'heretofore been had, and hereafter may be had againſt 'tenant in tail, or other tenant of the freehold, the re-'verſion or remainder, or the right of reverſion or 'remainder, then being in any other perſon or perſons; 'that every ſuch common recovery heretofore had, and 'hereafter to be had, of any lands, tenements or here-'ditaments, ſhall, as touching ſuch perſon and perſons 'which then had any remainder or reverſion, or right 'of remainder or reverſion, and againſt the heirs of 'every of them, ſtand, remain and be of ſuch like force 'and effect, and of none other, as the ſame ſhould have 'been if this act had never been made.

'5. Provided always, and be it further enacted by 'the authority aforeſaid, That this act, or any thing

'therein

beyond ſea, in order to defeat the Queen of what might accrue to her for his recuſancy

---

'therein contained, ſhall not extend to make void any 'eſtate or conveyance, by reaſon whereof any perſon 'or perſons ſhall uſe any voucher in any writ of *formedon*, now depending or hereafter to be depending, but 'that all and every ſuch vouchers in any writ of *formedon* ſhall ſtand and be in like force and effect, as if this 'act had never been made; any thing before in this 'act contained to the contrary notwithſtanding.

'6. Provided alſo, and be it enacted by the authority 'aforeſaid, That this act, or any thing therein contained, 'ſhall not extend to any eſtate or intereſt in lands, 'tenements, hereditaments, leaſes, rents, commons, 'profits, goods or chattels, had, made, conveyed or 'aſſured, or hereafter to be had, made, conveyed or 'aſſured, which eſtate or intereſt is or ſhall be upon 'good conſideration and *bona fide* lawfully conveyed or 'aſſured to any perſon or perſons, or bodies politick or 'corporate, not having at the time of ſuch conveyance 'or aſſurance to them made, any manner of notice or 'knowledge of ſuch covin, fraud or colluſion as is 'aforeſaid; any thing before mentioned to the contrary 'hereof notwithſtanding.'

(*b*) 27 Eliz. c. 4. 'Foraſmuch as not only the queen's 'moſt excellent majeſty, but alſo divers of her highneſs 'good and loving ſubjects, and bodies politick and cor- 'porate, after conveyances obtained or to be obtained, 'and purchaſes made or to be made, of lands, tene- 'ments, leaſes, eſtates and hereditaments, for money or 'other good conſiderations, may have, incur and receive

Made perpetual by 30 Eliz. c. 18. ſ. 3.

ſancy or flight, made a feigned gift of all his leaſes and goods, ſome conceived, as

---

'great loſs and prejudice by reaſon of fraudulent and 'covinous conveyances, eſtates, gifts, grants, charges 'and limitations of uſes heretofore made or hereafter to 'be made, of, in or out of lands, tenements or hereditaments ſo purchaſed or to be purchaſed; which ſaid 'gifts, grants, charges, eſtates, uſes and conveyances 'were or hereafter ſhall be meant and intended by the 'parties that ſo make the ſame to be fraudulent and 'covinous, of purpoſe and intent to deceive ſuch as have 'purchaſed or ſhall purchaſe the ſame; or elſe by the 'ſecret intent of the parties the ſame be to their own 'proper uſe, and at their free diſpoſition, coloured 'nevertheleſs by a fained countenance and ſhew of 'words and ſentences, as though the ſame were made '*bona fide*, for good cauſes, and upon juſt and lawful 'conſiderations:

'2. For remedy of which inconveniencies, and for 'the avoiding of ſuch fraudulent, fained and covinous 'conveyances, gifts, grants, charges, uſes and eſtates, 'and for the maintenance of upright and juſt dealing in 'the purchaſing of lands, tenements and hereditaments; 'be it ordained and enacted by the authority of this 'preſent parliament, That all and every conveyance, 'grant, charge, leaſe, eſtate, incumbrance and limitation 'of uſe or uſes, of, in or out of any lands, tenements or 'other hereditaments whatſoever, had or made any time 'heretofore ſithence the beginning of the queen's majeſty's

as is there obſerved, that the common law, which abhors all fraud, would make void this

---

'jeſty's reign that now is, or at any time hereafter to 'be had or made, for the intent and of purpoſe to de- 'fraud and deceive ſuch perſon or perſons, bodies poli- 'tick or corporate, as have purchaſed or ſhall after- 'wards purchaſe in fee-ſimple, fee-tail, for life, lives or 'years, the ſame lands, tenements and hereditaments, 'or any part or parcel thereof, ſo formerly conveyed, 'granted, leaſed, charged, incumbred or limited in uſe, 'or to defraud and deceive ſuch as have or ſhall pur- 'chaſe any rent, profit or commodity in or out of the 'ſame, or any part thereof, ſhall be deemed and taken 'only as againſt that perſon and perſons, bodies politick 'and corporate, his and their heirs, ſucceſſors, execu- 'tors, adminiſtrators and aſſigns, and againſt all and 'every other perſon and perſons lawfully having or 'claiming by, from or under them, or any of them, 'which have purchaſed or ſhall hereafter ſo purchaſe for 'money or other good conſideration, the ſame lands, 'tenements or hereditaments, or any part or parcel 'thereof, or any rent, profit or commodity in or out of 'the ſame, to be utterly void, fruſtrate, and of none 'effect; any pretence, colour, fained conſideration, or 'expreſſing of any uſe or uſes to the contrary notwith- 'ſtanding.

'3. And be it further enacted by the authority afore- 'ſaid, That all and every the parties to ſuch fained, 'covinous and fraudulent gifts, grants, leaſes, charges 'or conveyances before expreſſed, or being privy and 'knowing of the ſame or any of them, which after the

this gift as to the Queen (2). Lord Coke has in three different places (3) remarked upon

(2) Skin. 357. *Jones* v. *Aſhurſt* per Holt. acc.

(3) 3 Rep. 82 b. Co. Litt. 76 a. 290 b.

'twentieth day of *April* next coming ſhall wittingly and 'willingly put in ure, avow, maintain, juſtify or defend 'the ſame or any of them, as true, ſimple, and done, 'had or made, *bona fide*, or upon good conſideration, to 'the diſturbance or hindrance of the ſaid purchaſer or 'purchaſers, leſſees or grantees, or of or to the diſturb-'ance or hindrance of their heirs, ſucceſſors, executors, 'adminiſtrators or aſſigns, or ſuch as have or ſhall law-'fully claim any thing by, from or under them or any 'of them, ſhall incur the penalty and forfeiture of one 'year's value of the ſaid lands, tenements and heredita-'ments ſo purchaſed or charged; the one moiety 'whereof to be to the queen's majeſty, her heirs and 'ſucceſſors, and the other moiety to the party or parties 'grieved by ſuch fained and fraudulent gift, grant, 'leaſe, conveyance, incumbrance or limitation of uſe, 'to be recovered in any of the queen's courts of record, 'by action of debt, bill, plaint or information, wherein 'no eſſoin, protection or wager of law ſhall be admitted 'for the defendant or defendants; and alſo, being thereof 'lawfully convicted, ſhall ſuffer impriſonment for one 'half year without bail or mainprize.

'4. Provided alſo, and be it enacted by the autho-'rity aforeſaid, That this act or any thing therein 'contained ſhall not extend or be conſtrued to im-'peach, defeat, make void or fruſtrate any convey-'ance, aſſignment of leaſe, aſſurance, grant, charge, 'leaſe, eſtate, intereſt or limitation of uſe or uſes, of, 'in,

upon the force of the word "declare" (4) with which the enacting part of the ſtatute

(4) and ſee in 3 T. R. 546. the obſervations of Ld. Kenyon C. J.

ſ in, to or out of any lands, tenements or hereditaments ſ heretofore at any time had or made, or hereafter to be ſ had or made, upon or for good conſideration and ſ *bona fide*, to any perſon or perſons, bodies politick or ſ corporate; any thing before mentioned to the contrary ſ hereof notwithſtanding.

' 5. And be it further enacted by the authority aforeſ ſaid, That if any perſon or perſons have heretofore ſ ſithence the beginning of the queen's majeſty's reign ſ that now is, made or hereafter ſhall make any conſ veyance, gift, grant, demiſe, charge, limitation of ſ uſe or uſes, or aſſurance of, in or out of any lands, ſ tenements or hereditaments, with any clauſe, proſ viſion, article or condition of revocation, determiſ nation or alteration, at his or their will or pleaſure, ' of ſuch conveyance, aſſurance, grants, limitations of ſ uſes or eſtates of, in or out of the ſaid lands, teneſ ments or hereditaments, or of, in or out of any part ſ or parcel of them, contained or mentioned in any ' writing, deed or indenture of ſuch aſſurance, conveyance, grant or gift; and after ſuch conveyance, grant, ' gift, demiſe, charge, limitation of uſes or aſſurance ſo ſ made or had, ſhall or do bargain, ſell, demiſe, grant, ſ convey or charge, the ſame lands, tenements or here' ditaments, or any part or parcel thereof, to any perſon ' or perſons, bodies politick and corporate, for money ſ or other good conſideration paid or given (the ſaid ſ firſt conveyance, aſſurance, gift, grant, demiſe, charge

' or

tute 13 Eliz. c. 5. is introduced, as implying a legiſlative recognition of the common law.

In oppoſition to this, we find it agreed in *Twyne*'s caſe (5), that by the common law an eſtate made by fraud ſhould be avoided only by him who had a former

(5) 3 Rep. 83.

'or limitation, not by him or them revoked, made void 'or altered, according to the power and authority re-'ſerved or expreſſed unto him or them in and by the 'ſaid ſecret conveyance, aſſurance, gift or grant), That 'then the ſaid former conveyance, aſſurance, gift, 'demiſe and grant, as touching the ſaid lands, tene-'ments and hereditaments, ſo after bargained, ſold, 'conveyed, demiſed or charged, againſt the ſaid bar-'gainees, vendees, leſſees, grantees and every of them, 'their heirs, ſucceſſors, executors, adminiſtrators and 'aſſigns, and againſt all and every perſon and perſons 'which have, ſhall or may lawfully claim any thing, 'by, from or under them or any of them, ſhall be 'deemed, taken and adjudged to be void, fruſtrate, and 'of none effect, by virtue and force of this preſent act.

'6. Provided neverthelefs, That no lawful mortgage 'made or to be made *bona fide*, and without fraud or 'covin, upon good conſideration, ſhall be impeached 'or impaired by force of this act, but ſhall ſtand in the 'like force and effect as the ſame ſhould have done if 'this act had never been had nor made; any thing in 'this act to the contrary in anywiſe notwithſtanding.'

right,

right, title, intereſt, debt or demand; and that though by the common law a covinous gift would not be ſuffered to defeat an execution iſſued in reſpect of a former debt, according to the Book (6), yet that he who had right, title, intereſt, debt or demand more puiſne, ſhould not avoid a gift or eſtate precedent gained by fraud before the ſtatutes (7); and in confirmation of this latter poſition it was ſaid by Yelverton in *Upton* v *Baſſet* (8), and conceded by the whole court, that at common law there was not any fraud remedied which ſhould defeat an after purchaſe, but that only which was committed to defraud a former intereſt. And it is worthy of obſervation that Owen J. who was one of thoſe who decided the caſe in Croke laſt mentioned, and agreed with the expoſition of the object and operation of the ſtatute given by Yelverton, declared himſelf to have been preſent at the making of the ſtatute, and to have well underſtood the deſigns and motives of the framers. The genius of the common law of England, it is true, oppoſes itſelf to every ſpecies of fraud, ſo that

(6) Vid. 22 Aſſize, pla. 72.

(7) Lane 105.

(8) Cro. Eliz. 444.

that nothing can have legal validity which has apparent fraud in its compoſition; but as the common law is tender of preſuming fraud from circumſtances, and expects that it be manifeſt or plainly inferible, ſtatutes have been framed of preventive efficacy, whoſe object it has been to embarraſs deceitful contrivances by requiring, as the characteriſtics of honeſty and truth, certain badges and diſtinctions which it is impoſſible or difficult for fraud to aſſume; grounded upon an opinion, as may be ſuppoſed, that though honourable dealing may be ſometimes expoſed by theſe teſts to inconvenience and miſconſtruction, yet the weight of the inconvenience preſſes upon all the contrivers of fraud who are called upon for thoſe ſigns and credentials which virtually involve the deſtruction of their ſchemes. *Satius eſt a paucis juſtam excuſationem non accipi quam ab omnibus aliquam tentari.* No ſtatutes, it is true, can make that fraudulent which was not fraudulent before: in this view, all ſtatutes againſt fraud are ſimply declaratory of the common law; but they appear to have

have been all framed either with the deſign of multiplying the difficulties of fraud by inſiſting on thoſe ſigns of innocence which are the leaſt reconcileable with fraudulent purpoſes, or of ſupplying by artificial teſts the antiquated ceremonies of authentication which in the ſimple ages of the law accredited the ordinary transfers of property.

The firſt expounders of the ſtatutes of Elizabeth againſt fraudulent conveyances have given them a very ſtrong conſtruction againſt voluntary diſpoſitions; and particularly the ſtatute made for the protection of creditors they have underſtood in a ſenſe correſpondent to the probable intention of the makers to ſupply the defect of the common law and of former ſtatutes (*c*), where

(*c*) The ſtat. 50 Ed. 3. c. 6. extended only to the caſe of perſons who, to defraud their creditors of all remedy, conveyed their property in truſt, and then eluded execution againſt their perſons by flying to ſanctuaries and privileged places; but it ſeems, that where their perſons remained expoſed to execution, ſuch ſale or aſſignment was not fraudulent within that act. Dyer 295 a, b. Co. Litt. 76 a. The ſtat. 3 H. 7. c. 4. ſeems to carry the relief further than the 50 Ed. 3. c. 6. for, though

where they fell ſhort of relieving thoſe whoſe debts had ariſen ſubſequently to the fraudulent alienation (*d*). They reſolved upon ſuch a conſtruction of both theſe ſtatutes as might extract from them an operative and beneficial law, and, as they ſeemed purpoſely written in general language to give room for a more extended judicial interpretation, they conſidered largely their ſpirit and purview, and framed upon them certain rules of evidence for the ſuppreſſion of fraud, which, as they are the reſult of ſtrong ſenſe, and founded in general utility, ought not to be

---

though the preamble recites the practice of flying to ſanctuaries as part of the evil to be remedied, the enacting part is general, and ſeems ſo to have been conſidered. Cro. Eliz. 291. Dyer 295 b. But this ſtatute is confined to gifts of goods and chattels. The ſtat. 1 Ric. 2. c. 9. touches only caſes, which cannot now happen, of fraudulent gifts to great men for maintenance againſt the ſuits of creditors.

(*d*) In the caſe of *Taylor* v. *Jones*, 2 Atk. 601. Lord Hardwicke obſerved upon the words in the ſtatute 13 Eliz. "to defraud creditors and others," that the word *others* ſeemed to have been inſerted to take in all manner of perſons, as well creditors after as before the conveyance, whoſe debts ſhould be defrauded.

lightly

lightly departed from for the ſake of obviating particular hardſhips.

They ſeemed to be of opinion, that both theſe ſtatutes would be inoperative, unleſs they collected from them a ſpirit denunciative of voluntary gifts and conveyances, when oppoſed to the claims of creditors and purchaſers for valuable conſideration. At the ſame time, they ſhewed an inclination to limit the import of the word voluntary to thoſe caſes only wherein no inducement of intereſt appeared, and to extend the notion of valuable conſideration to whatever caſes admitted a natural ſuppoſition that one act was made the condition of another, or that in a general compromiſe or adjuſtment of intereſts a thing was parted with, which could legally have been withheld, in furtherance of the general proviſions of a ſettlement. With this liberal underſtanding of the words *voluntary* and *valuable* they thought, as it ſeems, that a ſevere conſtruction would beſt advance the remedy intended by theſe ſtatutes, and that their true meaning was to afford a ſtrong protection to *bona fide* creditors and purchaſers againſt ſpecious precedent

precedent transfers not induced by thoſe ordinary expectations of recompence which are likely to influence men to part with their own; more particularly with reſpect to the ſtatute 27 El. c. 4. to have permitted reaſons, founded on the inducements of natural love, however reſpected in law (*e*), to prevail againſt ſubſequent purchaſers, would have tended, in a great meaſure, to defeat the effect and intent of that ſtatute, ſince there is an additional ground for the ſuſpicion of ſecret coalitions to the prejudice of others where the parties to the tranſaction are within the influence of ſuch private motives and affections. And ſo ſevere is the operation aſcribed to the ſtatute laſt mentioned, that the purchaſer has always been held to be unaffected by notice of the precedent conveyance (9). The voluntary transfer is void as to him, and he is ſafe in treating it as an abſolute nullity. A diverſity of conſtruction has, however, on ſome points

(9) 5 Rep. 60. Cowp. 711, 712.

(*e*) See a pleaſing picture of the tenderneſs of the law for the parental and fraternal affections in Plowd. Com. 307. *Sherrington v. Strotton.*

prevailed in reſpect to the ſtat. 13 and ſtat. 27 Eliz. and the earlieſt deciſions of the courts have ſhewn a degree of favour to voluntary gifts againſt *creditors*, whoſe claims have ariſen upon ſubſequent contracts, which has not been extended to conveyances without valuable conſideration, as againſt a ſubſequent *purchaſer*, although no treaty for the ſubſequent purchaſe was in exiſtence, or in contemplation, at the time of ſuch voluntary conveyance.

It is only, however, under particular circumſtances, that this ſupport has been allowed to voluntary gifts againſt *bona fide* creditors upon ſubſequent contracts; the bare circumſtance of the non-exiſtence of the particular debt at the time of the voluntary alienation is not always a ſufficient ground for ſuſtaining it. The tranſaction is ſubjected to a more ſcrupulous teſt, and two requiſites to its validity have generally been inſiſted upon. The conveyer muſt ſtand generally uninvolved at the time of making his voluntary gift or diſpoſition; for it ſeems to be eſtabliſhed as a rule, that if he is then incumbered with debts, ſuch

his voluntary alienation will be as void againſt debts ſince contracted as againſt thoſe which were previouſly exiſting; and, according to the ſoundeſt opinions, ſuch voluntary diſpoſitions will not be valid againſt ſubſequent creditors, unleſs they are ſupported by the ſtrong obligation of a parent to ſecure a proviſion for his offſpring (10). The opinions of Lord Hardwicke on this point are pretty clear and uniform; and a proper attention to the ſentiments of that Judge might perhaps reſcue this part of the ſubject from the deſultory and floating ſtate into which, according to ſome opinions, it has been thrown. In the caſe of *Ruſſel* v. *Hammond* (11) Lord Hardwicke is made to ſay, that "though he had hardly known one caſe, where the perſon conveying was indebted at the time of the CONVEYANCE, that the conveyance has not been deemed fraudulent; yet that, to be ſure, there were caſes of voluntary SETTLEMENTS that were not fraudulent, and thoſe were, where the perſon making them was not indebted at the time, in which caſe ſubſequent debts would not ſhake ſuch ſettlements." We obſerve,

(10) Style's Reports, 446. 1 Brown's Chancery Reports, 90.

(11) 2 Atk. 13.

ſerve, that in the latter part of this remark the word *ſettlement* is uſed inſtead of *conveyance*, which firſt occurs; for what is ſecondly ſtated in the foregoing obſervation is true only of ſettlements or conveyances by way of family proviſion, and not of voluntary conveyances to ſtrangers, which, notwithſtanding the perſon conveying is not indebted at the time of making ſuch conveyances, will, it ſeems, yet be fraudulent under the ſtat. 13 El. c. 5. and by virtue of that ſtatute utterly void againſt all ſubſequent creditors. And even voluntary proviſions for a man's own family, if the ſettlor be conſiderably indebted at the time (*f*), are void againſt his general creditors, as well with reſpect to thoſe whoſe debts are ſubſequent (12), as to thoſe whoſe debts were precedent to ſuch proviſions. In the caſe of *Ruſſel*

(12) 1 Atk. 94. *Walker* v. *Burrows*. 2 Atk. 600. *Taylor* v. *Jones*.

(*f*) In the caſe of *White* v. *Sanſom*, 3 Atk. 410. Lord Hardwicke diſmiſſed the bill of a perſon claiming as a creditor, principally becauſe it was *doubtful* whether the debt accrued before or after the ſettlement, which ſhews the leaning of the court of chancery in favour of family proviſions.

v. *Hammond* above referred to, the general creditors did not reſt their claims merely on the circumſtance of the ſettlement's being voluntary, but on the concomitant fact of the ſettlor's being largely indebted at the time of making the ſettlement; and although their bill was diſmiſſed as to ſome part of the eſtate in ſettlement, which turned out to be ſuſtained by a valuable conſideration, the chancellor made it appear clearly to be his opinion, that if the ſettlement *had* been *voluntary*, it could not have been ſupported againſt the general creditors, becauſe the ſettlor was incumbered (*g*) at the time of making it.

But the words of Lord Hardwicke above cited extend no further than to ſhew, that *there were caſes* of voluntary ſettlements not fraudulent againſt creditors, where the perſons making them were not indebted at the time. They cannot be interpreted as lay-

(*g*) See the remark by the court in *Taylor* v. *Jones*, 2 Atk. 602. "If a man is in indigent circumſtances at the time of making the ſettlement, it is evidence to ſhew, that it was made with an intent to commit a fraud."

ing

ing down a rule, that *all* voluntary ſettlements are good againſt ſubſequent creditors, even if the ſettlors are unincumbered at the time of making them (*b*); and indeed, that ſuch general maxim was not adopted by his Lordſhip, appears by the deciſion in *Ruſſel* v. *Hammond*, with reſpect to one part of that caſe, for there being no valuable conſideration to ſupport the ſettlement made by the ſon, *William Hammond*, of his own eſtate, though it did not appear that he was at all indebted at the time of making the ſettlement, but rather the contrary is inferible from the ſtreſs laid upon this circumſtance by the creditors in the queſtion reſpecting the ſettlement by the father, and the ſilence of the caſe reſpecting it in regard to the ſon's ſettlement, ſuch ſettlement by the ſon was held fraudulent and void againſt the creditors, who were decreed to be relieved accordingly.

(*b*) In the caſe of *Jones* v. *Marſh*, Caſ. Temp. Talb. 64. Lord Talbot declined giving any opinion how far a family ſettlement, without any conſideration, would be fraudulent againſt ſubſequent creditors, though the party was not indebted at the time.

Neither will the attentive reader of the few caſes and opinions in the books which bear directly upon this point be ſatisfied with the ſimple diſtinction above noticed between voluntary family ſettlements and voluntary conveyances to ſtrangers, or be inclined to adopt it as a general rule, that a voluntary ſettlement merely as ſuch made by one not indebted at the time, is, at this day, ſafe againſt ſubſequent creditors; but the inveſtigation will, perhaps, conduct him through ſome perplexity to a ſub-diſtinction between voluntary family ſettlements themſelves, in which ſomething like a principle is diſcoverable of deciſive application: he will obſerve an accepted implicit diſtinction between a voluntary ſettlement made before children born, and one made after iſſue, in reſpect to its validity as againſt *ſubſequent* creditors; and that the moſt favoured ſort of ſettlement is that which is induced by paternal tenderneſs, by way of proviſion for a child or children in being (*i*).

This

(*i*) In *Walker* v. *Burrows*, 1 Atk. 94. the voluntary ſettlement was made in favour of children in being;

This favour of the law towards proviſions for children is diſtinctly ſtated by Lord Hardwicke in the caſe of Lord *Townſend* v. *Windham* (14), in the following words: "If there is a voluntary conveyance of real

(14) 2 Vez. 10. vid. alſo *Middlecome* v. *Marlow*, 2 Atk. 520.

ing; and Lord Hardwicke there obſerved, adverting to the effect of the ſtat. 13 Eliz. c. 5. that it was neceſſary to prove, that the perſon conveying was indebted at the time of making the ſettlement, or *immediately after the execution of the deed*, that a different notion, were it to prevail, would be attended with bad conſequences, becauſe the ſtat. extends to goods and chattels, and would defeat every proviſion for children and families, though the father was not indebted at the time. The caſe, however, of *Stileman* v. *Aſhdown*, 2 Atk. 481. furniſhes an exception to this rule, wherein it appears, that a ſettlement upon children, though made by a perſon not indebted at the time, may yet be void as againſt ſubſequent creditors, if any thing in the tranſaction affords ground for an inference that the proviſions were made with a view to becoming indebted. See poſt, p. 25, et ſeq.

The caſe of *Hungerford* v. *Earl*, 2 Vern. 261. does not accord with the opinion of Lord H. as expreſſed in *Walker* v. *Burrows*; for there the bond debt, againſt which the voluntary ſettlement was held void, *was contracted* 12 *years after* the making of the ſettlement; but there was another ſtrong ingredient in that caſe, *viz.* the poſſeſſion of the father, notwithſtanding the conveyance to the truſtees, which ſeemed very much to influence the judgment of the Lord Commiſſioner.

eſtate or chattel intereſt by one not indebted at the time, though he afterwards becomes indebted, and that voluntary conveyance is for a child, and without any particular evidence or badge of fraud to deceive or defraud *ſubſequent* creditors, that will be good; but if any mark of fraud or colluſion, or intent to deceive or defraud *ſubſequent* creditors, appears, that will make it void, otherwiſe not, but it will ſtand, though he afterwards becomes indebted;" and then follows this very important obſervation: "But I know no caſe on the 13th Eliz. where a man, *indebted at the time*, makes a mere voluntary conveyance to a child (15), and dies indebted, but that it ſhall be conſidered as part of his eſtate for the benefit of creditors." Here we may obſerve, that his Lordſhip's remark, as to the effect of circumſtances diſcloſing an intent to deceive, is included within the univerſal rule, that ſuch intent to deceive, where it appears, ſuperſedes the whole queſtion about conſideration, and reduces the purely voluntary conveyance, the proviſion for offſpring, and the conveyance for value, to the

(15) 3 Rep. 81 b.

the ſame nullity of operation. The whole of *Twyne*'s caſe, turned upon the intent to deceive, as inferible from circumſtances; the conveyance in which caſe was not voluntary, but made to a *bona fide* creditor, whoſe demand exceeded the value of the goods aſſigned to him; and if it were not a *clear* conſequence, that the reaſons which make a conveyance for value vitious muſt invalidate a voluntary conveyance, though meant as a proviſion for a child, the caſe of *Stileman* v. *Aſhdown* (16), would eſtabliſh the corollary.

(16) 2 Atk. 481.

This caſe comprehended two queſtions; 1ſt, Whether a ſettlement made after marriage, but expreſſed to be in conſideration of a marriage portion by a perſon not indebted at the time was void againſt ſubſequent creditors; as to which the Chancellor thought it extremely clear, that, as the ſettlement, though after marriage, was in conſideration of a marriage portion, which, *for any thing that appeared*, was paid at the time, it could not be impeached by ſubſequent creditors. But the

to his being indebted at a future time, it is equally fraudulent, and ought to be ſet aſide; and his Lordſhip reſembled the caſe he was deciding to that of *Chriſt's Hoſpital* againſt *Budgin and Wife*, reported in 2 Vern. 683, where a huſband, having taken ſeveral mortgages and bonds in the name of himſelf and his wife, for money lent by himſelf, the Lord Keeper looked upon the wife ſurviving him to be in the nature of a joint purchaſer, and decreed againſt the heirs at law, but admitted that in the caſe of *creditors*, it might be fraudulent. If the principles above extracted be right, it would have been fraudulent againſt creditors, whether the huſband did or did not ſtand clear of debts at the time the bonds and mortgages were taken; and indeed, beſides the ſuſpicion which adheres to ſuch creation of joint intereſts, it may be doubted whether that protecting conſtruction which ſhields theſe proviſions for unportioned children, extends itſelf to mere gratuitous ſettlements on wives.

The deciſion in the caſe of *Stileman* v. *Aſhdown* ſhews, however, that the purpoſe of

of providing for a *child* muſt be unambiguous, and that the conveyance or ſettlement muſt be plainly calculated to effectuate the object propoſed; for we collect by inference from that caſe, that without any of thoſe extrinſic badges enumerated in *Twyne*'s caſe, (for though the father had poſſeſſion till his death, the preſumption of fraud from that circumſtance is anſwered by the title to the poſſeſſion, which, as a father, he might claim by right of natural guardianſhip during the nonage of his child,) a pretended proviſion or advancement may ſtand condemned by its own inadequacy and incongruity, with reſpect to the deſign profeſſedly in the contemplation of the parent and ſettlor.

SECTION II.

THE phraſes 'intent to defraud' and 'intent to deceive,' which occur in the ſtatutes under conſideration have ſometimes received a latitude of expoſition from the reſolutions in modern caſes, which does not correſpond with the ancient deciſions of judges familiarly converſant with the views of the legiſlature in framing thoſe ſtatutes.

Fraud conſiſts either in a ſingle act, or in a *continued* ſeries of acts, and two parties are always neceſſary,—a perſon deceiving, and a perſon to be deceived,—to give it that action and determination which renders it the ſubject of human cognizance and law (17). A general purpoſe of fraud exiſting in the heart of a man, without a particular object, cannot be crime in any ſyſtem of *human* law. Where fraud is made up of diſtinct acts their connection becomes difficult to be traced and aſcertained in proportion to their reciprocal diſtance, and the multiplicity of events with which

(17) 9 H. 6. 53. Poph. 143. Bridg. 128.

which they are incidently connected. In a leſs complex ſtate of manners its artifices were of ſimpler contrivance: deceit took a ſhorter aim; the ſcheme and the final object were ſeparated at ſmaller intervals, and were generally preſent at the ſame time to the view of the cloſe obſerver. The multiplied relations of life have refined the arts of deceit. As fraud has become more dextrous, its views have become more diſtant and leſs direct. And the proſpective connection between the original act and the ultimate purpoſe requires a longer courſe of deduction for its diſcovery and aſcertainment. The preventive activity of the law ought to increaſe in proportion to this growing difficulty of detection. Where the regular methods of ſcrutiny are baffled by evaſive dexterity, ſummary expedients muſt be uſed, and the law provides for its own imbecility by ſternly diſcountenancing all myſtery and ambiguity of action. The luxuriant intricacy of the legal modes of transfer and forms of technical proceedings, as they multiply the means of fraud, ſo they call for the increaſed vigilance of the law againſt colourable and equivocal

tranſ-

tranſactions. Legal artificial preſumption at length comes in aid of this vigilance, and where experience has pointed out a ſucceſsful engine of fraud, the very uſe of that engine is made in ſome caſes to ſuperſede enquiry into intention, by being itſelf turned into a ſtrong preſumptive indication of fraudulent deſign. The hardſhip of ſuch preſumptions (if any there be) is outweighed by their utility; nor ought we to forget the difference between ſtated preſumptions by ſtatute (*l*), which are expreſs and cautionary rules of conduct, and the preſumptions of unwritten law, of which the heads of the learned are the only repoſitaries. If a rule of conſtruction, with reſpect to our tranſactions with each other, is for the public good, it is only neceſſary that it be clear and oſtenſible; and no man can reaſonably complain of a reſtriction upon his individual, which benefits him in his ſocial ca-

(*l*) Lord Mansfield in 2 Burr. 1072. ſtates the diſtinction between preſumptions grounded upon evidence, and preſumptions of law, which are not to be contradicted. The ſtatutory preſumption alluded to in the text ſeems to be a third ſort, depending upon an artificial rule of conſtruction.

pacity, if the terms of that reſtriction be intelligible, general, and certain.

The earlieſt expounders of the ſtatutes of Elizabeth againſt fraudulent conveyances, appear to have attributed to both of them a ſpirit and meaning conſonant to what has juſt been ſurmiſed: but they thought it more pointedly within the expreſſion of the 27 Eliz. c. 4. to conſtrue a voluntary gift or conveyance, if followed, though after a long interval, by an attempt to convey to a purchaſer for valuable conſideration, as ſtrong *preſumptive* evidence at *leaſt* of an intent to deceive. They determined, however, that the voluntary conveyance was good conſidered by itſelf, and good againſt all but one who purchaſed for a conſideration of value; but that when a purchaſer of that deſcription appeared, the firſt conveyance, coupled with the ſubſequent attempt to ſell for value, made up a compounded evidence of fraudulent intention. The abſurdity of making that fraud by *ex poſt facto* circumſtances which was not fraud in the commencement (*m*),

(*m*) Vid. Chan. Caſ. in Lord King's time, *Dews* v. *Brand*, and ſee the remark by Doderidge, J. 2 Roll. 306.

cannot with reaſon be objected. Such objection is anſwered by the difference between *making* and *proving*, for though an act, which muſt be conſidered as innocent when committed for want of evidence of the contrary, cannot be made criminal by ſubſequent events, yet evidence and preſumption may well ariſe from ſubſequent events to annex a conſtruction of guilt to that which ſtood free from imputation at firſt (*n*). The principle of this obſervation applies alſo to the ſtatute 13 Eliz. where debts are contracted ſubſequently to the voluntary conveyance, and where thoſe grounds of favour which have before been conſidered do not exiſt in the caſe.

In looking a little more inquiſitively into the nature of this preſumption of fraud or intent to deceive, as it ariſes upon theſe ſtatutes, we are led to obſerve that the fraud does

(*n*) Vid. *Colvile* v. *Parker*. Cro. Jac. 158. "Becauſe it was a voluntary conveyance at firſt, and ſhall be intended fraudulent at the beginning." For the numerous inſtances in which, in our law, ſubſequent acts are admitted to expound original intention, vid. *Dowman's Caſe*, 9 Rep. 11. Wingate's Maxims, Max. 37. Vid. alſo Lane 47. and Plowd. Com. 473. et ſeq.

not

not conſiſt in the actual deception of the purchaſer or creditor, but in making a conveyance with a *view* to deceive or defraud them, which intent to deceive or defraud cannot be manifeſted and determined until a purchaſer or creditor ariſes: the whole is then regarded as one tranſaction by relation, and the fraud in the contemplation of the ſtatutes is then complete. With reſpect to the ſtatute 27 Eliz. c. 4. all that is neceſſary to be ſhewn, as conſtitutive of the fraud thereby intended, is a conveyance made with an intent to deceive a purchaſer. This intent to deceive is evidenced by a voluntary conveyance, coupled with a ſubſequent agreement to ſell the ſubject of that voluntary conveyance, and the fraud being complete in this ſtage of the tranſaction, the purchaſer may execute his bargain notwithſtanding he has notice of the former voluntary conveyance (18). It is not the accompliſhment of the deceit upon the purchaſer that conſtitutes the fraud, but the deceitful intention in the ſeller manifeſted by his proceeding to the ſecond conveyance. Though the purchaſer be not deceived, a voluntary conveyance may ſtill

(18) Vid. Gouch's Caſe, 5 Co. 60 a. Eq. Caſ. Abr. 334. Ambl. 288. Cowp. 280. 2 Brown C. R. 2. 148.

be fraudulent (*o*), and if ſo it is conſequently void as againſt him if he completes his purchaſe; and the completion of his purchaſe by an executed conveyance (19) is neceſſary to qualify him under the ſtatute to avoid the firſt conveyance, for the ſtatute is expreſs that the firſt conveyance ſhall only be void againſt the purchaſer, or thoſe claiming under him (*p*). But by this

(19) Vide the caſe of *Holford* v. *Holford*, Chan. Caſ. 216.

(*o*) In *Gouch*'s caſe the opinion of Ld. Wray ſeems to reſt upon a concluſion that the fraud is complete and ſufficiently proved, according to the evidence impliedly marked out by the ſtatute, in the very propoſal to ſell. He puts this caſe. A. ſeized of land in fee makes a fraudulent conveyance with an intent to deceive and defraud purchaſers againſt the ſtatute 27 Eliz. and continues in poſſeſſion, and is reputed owner. B. enters into *diſcourſe* with A. for the purchaſe of it, and by *accident* B. has notice and knowledge of this fraudulent conveyance, and nevertheleſs concludes with A. and takes his aſſurance of him, in this caſe B. ſhall avoid the ſaid fraudulent conveyance notwithſtanding the notice.

(*p*) So with reſpect to the relief which a court of equity gives on the 13 Eliz. c. 5. a creditor muſt complain, or a ſettlement cannot be ſet aſide for fraud, and he muſt put himſelf in a ſituation to complain, by getting judgment for his debt, and ſtating that by the ſettlement he is defrauded. Vid. 1 *Vezey, Jun.* 160.

avoidance of the firſt conveyance, beſides the protection of the purchaſer, the ſtatute has ſecondarily in view the puniſhment of the deceit, and as the voluntary alienee is regarded by the jealouſy of the law, where circumſtances and parties afford a poſſible ground for the preſumption, as a participator in the fraud, he is involved in a common loſs by the operation of the ſtatute.

The loſs to the ſeller is not ſo eaſily underſtood by thoſe who regard only what has been the conſequence of the ſtatute, namely, the opportunity thereby given to the voluntary conveyer to defeat his own antecedent gift by a ſale for valuable conſideration. But their difficulty is only the difficulty of intellectual ſeparation. It ariſes from viewing the conſequences of that law as it has been ſince acted upon, inſtead of the pre-exiſtent evil againſt which it provided. Before that ſtatute, the purchaſer was the party intended to be injured—the injury of the unſuſpecting buyer was the ſpeculation of the fraudulent ſeller. The ſcope and purpoſe of the act being wholly preventive, could not with

conſiſtency look to the future exiſtence of the thing againſt which it was made. It was calculated to remove and not to remedy. The miſchief in its contemplation was annihilated by its proviſions, and we take a wrong ground when we look to exiſting evils in the interchange of property for the explanation of that law. Before the ſtatute 27 Eliz. the purchaſer was the party in danger, and the hopes of advantage were with the projectors of the fraud againſt him, *videlicet*, the parties to the voluntary alienation. The efficacious prevention of that deceit, againſt the poſſibility of the return of which the ſtatute provided, ought to be the governing rule in the conſtruction of its clauſes, and to this purpoſe the potential exiſtence of the miſchief ſuppreſſed ſhould be regarded as an actual and inſtant peril. The ſtatute was meant to bear upon the voluntary alienee, and to relieve the purchaſer; but the ſafety of the purchaſer produced by its ſucceſsful operation has turned the regards of compaſſion towards the caſe of the voluntary alienee; and we are apt to forget that, beſides the unſteady direction and relaxing effect of theſe ſympathies in the conſtruction of a general law,

law, the peril to the purchaſer muſt revive under indulgence to the donee, who cannot be favoured on any general principle of compaſſion, but at the expence of a claim more ſtrong and meritorious.

By thus conſidering the avoidance under the ſtatute 27 Eliz. both as protective and ſuppliciary, and by regarding the fraud as perfected in its eſſence, though unexecuted in its object, by the voluntary conveyance made with intent to deceive, of which fraudulent intent the ſubſequent contract is the proper evidence, we ſee the reaſon of the unimportance of notice to the ſubſequent purchaſer, who, if he has knowledge of the firſt conveyance, ſees the fraudulent intent diſcloſed in the very treaty of ſale, and has only to complete his purchaſe, that by virtue of the valuable conſideration, he may become qualified under this ſtatute to treat *that* as void which he before perceived to be fraudulent. A direct notice communicated by the ſeller to the purchaſer before the purchaſe completed, implies a ſelf-contradiction, and was not to be ſuppoſed or provided for, and when the caſes ſaid that the voluntary convey-

ance was void againſt the purchaſer, notwithſtanding ſuch purchaſer had notice, another kind of notice than that firſt mentioned muſt have been in contemplation. If the notice is intrinſically contained in the deeds which accompany the ſale, though in common caſes ſuch notice may enervate the title and blemiſh the innocence of the purchaſer, as where a man takes a conveyance of a legal eſtate with knowledge of an adverſe equitable title or incumbrance, yet where the queſtion turns wholly upon the intent to deceive in the vender, it cannot be ſaid that the vender has purified himſelf by a delivery of the title deeds, while he is ſilent as to the exiſtence of a fact overthrowing the title (*q*), which, though it might appear by an examination of the deeds, he has tacitly contradicted by the very treaty of ſale. If notice comes to the purchaſer from the

(*q*) This muſt be underſtood retroſpectively to the time when the ſtatute was made, the proviſions of which neceſſarily ſuppoſe ſuch a conſequence from making a voluntary conveyance, and afterwards a ſale to a purchaſer.

voluntary

voluntary alienee, or through any other extrinſic collateral or caſual channel, that clearly can be no reſtoration of the innocence of the ſeller—his original intent to deceive remains unabſolved.

Theſe deciſions, however, in favour of purchaſers with notice have by ſome been looked upon as unreaſonable and unjuſt; but they cannot be unreaſonable and unjuſt if they have followed up the ſpirit of the ſtatute, and if that ſpirit was reaſonable and juſt, both which poſitions it is the object of theſe ſheets to eſtabliſh. It has been ſaid that "if the conſtruction of this act, which has certainly prevailed in favour of purchaſers with notice, were traced, it would probably appear to have originated in the opinion that the act avoided all voluntary conveyances whatever, though, continues the writer, it merely affects fraudulent conveyances (20)." The great queſtion in theſe caſes is whether the particular conveyance or ſettlement be void or effectual: it cannot be only voidable: it is radically bad or good with reſpect to

(20) Fonbl. Treat. Eq. 1 vol. 271. note.

deliver the ſubject from a ſort of puzzle or *petitio principii*, or, in other words, from the difficulty created by fallaciouſly confounding with the terms of the queſtion a ſubject matter which without an abſurdity cannot be ſuppoſed to exiſt till the queſtion is decided.

If this full expreſs notice imparted immediately by the ſeller, or by his authority to the purchaſer, cannot be ſuppoſed to happen but upon an aſſurance that the firſt conveyance was void, it muſt imply alſo an aſſurance that once void it is incapable of confirmation.

If the firſt conveyance be not void, then notice cannot deteriorate the condition of the purchaſer. If, on the other hand, the firſt conveyance be void, ſubſequent notice however imparted can have no effect, in ſuch caſe the operation of notice is anticipated by the deſtruction of the ſubject (*s*).

(*s*) *Buller* v. *Waterhouſe*, reported in Sir Thomas Jones 94. was a caſe upon a power of revocation included in a ſettlement by a father and mother on their ſon's marriage, which power being reſtrained to be exerciſed only with the

the conſent of four truſtees, or the ſurvivor of them, was adjudged out of the ſtatute 27 Eliz. c. 4. And there was there a plain valuable conſideration. It is true that Pollexfen at the bar mentioned the circumſtance of notice as to the purchaſer as precluding any inference of fraudulent intent as againſt him, but as there was quite enough in the caſe to ſupport the ſettlement without any reſort to this reaſoning, it cannot be known what ſtreſs the court laid upon it.

And in *Fitz-James* v. *Moys*, 1 Sid. 133. that the purchaſer had no notice of the firſt conveyance, is made an ingredient in the ſtatement of the caſe, yet as it does not appear to have made any part of the foundation of the opinion of the court in the direction given to the jury, it is only a proof of the ſenſe the reporter entertained of its importance.

The ſame obſervation applies to the caſe of *Colvile* v. *Parker*, Cro. Jac. 158. quod vid.

Where facts, which have no influence on the judgment of the court, find their way into the ſtatement of a caſe, the ſtudent is ſometimes miſled by the reporter's apparent appreciation of them too haſtily to conclude them of importance. In *Goodright* v. *Moſes*, 2 Black. 1019. where the purchaſer of the eſtate claimed under and ſtood in the place and character of a volunteer as againſt the former leſſee, who was a valuable purchaſer of his leaſe, (it being at rack rent)* it is not eaſy to ſee how the notice which the purchaſer of the eſtate is repreſented to have had of this leaſe could have influenced the queſtion. But it may be remarked that this circumſtance of notice is often mentioned in the report of a caſe with an air of importance, when in point of effect, it is perfectly neutral.

* Vid. 2 Vern. 347.

SECTION III.

A PRINCIPLE of adherence to the ſtrict import of the phraſes "intent to deceive" and "intent to defraud," which occur in theſe ſtatutes, may ſeem to juſtify the opinion of ſome ancient lawyers, that only that perſon who could be conſidered as the object of the fraudulent intent, was qualified to treat the fraudulent conveyance as void. If a voluntary gift or conveyance be made with a manifeſt intention to effect a purpoſe which diſcovers no original deſign of defrauding thoſe who come to take advantage of the ſtatutes, they ſhall, according to this opinion, have no relief, although their particular intereſts may be conſequentially affected. A ſimilar principle of conſtruction, before the making of thoſe ſtatutes of Elizabeth, which are our preſent concern, ſeemed to prevail in the deciſions of the judges upon other ſtatutes made in ſuppreſſion of fraud; the reſolution in *Warneford's*

Warneford's caſe determined in the 3d year of Elizabeth was founded upon it. That caſe was as follows: A man holding lands of the queen *in capite* by knight's ſervice, made a feoffment of the ſame with a fraudulent intent to defeat an execution for damages in which he had been condemned in B. R. but the courſe he took was by annexing a condition to the feoffment, ſuch as is within the letter of the ſtatute 52 Hen. 3. c. 6. againſt fraudulent conveyances to defeat lords of their wardſhips, (which right of wardſhip is preſerved or rather affirmed in the ſtatute of wills (1), 32 Hen. 8. c. 1. together with other fruits of tenure, as to one third of the lands ſo alienated) and upon the feoffor's dying, the heir being within age, the queſtion was whether the heir and the third part of the lands ſhould be in ward. And in the court of wards it was reſolved againſt the queen, upon the ground that the intent was to ſave the eſtate from the execution and not to defraud the queen, and ſo againſt her majeſty there appeared no covin (2). The caſe of *Tyrer* and *Littleton*, cited in the caſe of the *Chancellor* of *Oxford* (3), was thus upon the ſpecial verdict: Thomas

(1) Vid. *Bingham's* caſe, 1 Rep. 93 b.

(2) Dyer, 192 b. 167 b.

(3) 10 Report 56.

Tyrer was ſeized in fee of lands held of the manor of H. by fealty, rent, ſuit of court, and the render of the beſt beaſt upon the death of every tenant in fee ſimple by way of heriot, and Thomas Tyrer being ſo ſeized, in conſideration of an intended marriage between his ſon John and one Joyce Grove, enfeoffed the ſaid John of the ſaid lands to hold to him and his heirs. John before his marriage by indenture demiſed the ſame lands to his father Thomas for a term of 40 years, if Thomas ſhould ſo long live, and this he did *with intent* to deprive the wife of the benefit of her dower until the death of the father. The marriage took effect and afterwards Thomas died, living John the ſon, and whether a heriot was due to the lord upon his dying poſſeſſed only of the term of years, upon the ground that the feoffment and demiſe were fraudulent againſt the lord, was the queſtion. And becauſe it was found by the ſpecial verdict, that the intent of the feoffment and demiſe was to deprive Joyce of the benefit of her dower, until the death of the father, it was held that the tranſaction ſhould not be extended by conſtruction to any other intent. And the

the principle of *Warneford*'s caſe above-mentioned was relied upon, which deciſion it was ſaid was applicable *à fortiori* to the caſe then before the court, becauſe in *Warneford*'s caſe there was ſuch a fraudulent intent as would have avoided the conveyance as againſt creditors, had any ſuch appeared to diſpute its validity; but in *Tyrer* v. *Littleton*, the real intent was not fraudulent.

The complaint of the preamble of the ſtatute 13 Eliz. c. 5. is, that feoffments, grants, alienations, conveyances, &c. had been contrived, and deviſed of malice, covin, colluſion, or guile, to the end, purpoſe, and intent to delay, hinder, or defraud creditors and others of their juſt and lawful actions, ſuits, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries, and reliefs, and the enacting clauſe avoided ſuch feoffments, &c. made with ſuch intent, "only as againſt ſuch perſon or perſons whoſe actions, ſuits, debts, &c. where, ſhould, or might be diſturbed, hindered, delayed, or defrauded." This avoiding clauſe might ſeem, perhaps, by analogy

of principle with the caſes juſt cited, to be capable of a diſtributive conſtruction with reſpect to the different claſſes of perſons, whoſe intereſts or claims were the objects of the fraudulent intent. A clear intent to defraud a creditor, though it vacated the gift or conveyance as againſt all *creditors*, might not, in ſome opinions, let in any other rights than thoſe of creditors; ſo as that perſons, claiming by forfeiture, or entitled to heriots, penalties, or mortuaries, might be excluded from the benefit of the ſtatute, in ſuch a caſe.

It might have been conſidered perhaps alſo, that if a plain intent to defraud one particular deſcription of perſons were conſtrued to vacate the conveyance, or other fraudulent act, as againſt all whoſe claims might be conſequentially affected, the vindicatory juſtice of the ſtatute would be too much ſtretched, and the repoſe of titles too eaſily diſturbed. And it might have ſeemed, that as the voluntary conveyance may in fact be innocent, notwithſtanding the ſtatutory preſumption ariſing from a ſubſequent act or attempt, the offenſive matter, which conſiſts in the intent to deceive, ought only

to vitiate the conveyance to the extent of the meditated fraud, and that the ſtatute did not deſign that the partial diſhoneſty of the donor ſhould carry to the voluntary alienee, conſequences more ruinous than the ſubverſion of the ſpecific fraud, which was actually in projection.

But with how much reaſon ſo ever it may be contended, that a fraudulent gift or conveyance, *within the ſtatute* 13 *Eliz.* with whatever intent made, is rendered void, by the *ſtrong words of that act*, againſt *all* perſons whoſe intereſts or claims are enumerated *therein*; yet this argument will not bear out the inference of fraudulent intent, as againſt a ſubſequent *purchaſer*, from the circumſtance of the ſeller's having been indebted at the time of the ſettlement or conveyance, or warrant the reaſoning which aſcribes to the fact of being indebted in ſuch a caſe, any *confirmatory* indication of fraud, as againſt ſuch ſubſequent purchaſer. If the deſign of the perſon conveying, be to defraud his creditors; any intention of fraud with reſpect to a purchaſer, becomes by ſo much

the leſs preſumable; and though it may be true, that diſtreſsful circumſtances are a general temptation to diſhoneſty, yet, the purview of the ſtatute looks only to a particular intent, and that intent is only diſcernible in the natural concert of motives and actions. The contrary reaſoning confounds the operation and objects of the two ſtatutes, and converts the evidence of intent under the one, into an evidence of intent under the other, where the two ſeveral intents have diſtinct and divergent aims (*a*). But, in *Doe* v. *Routledge* (4), which was a caſe between a ſubſequent purchaſer and a prior voluntary alienee, on the 27 Eliz. c. 4. the argument from the mouth of the venerable chief juſtice adopted the inference, to which the above reaſoning is oppoſed, in the following remark, aſcribed to him by the reporter,

(4) Cowp. 711.

(*a*) In *Beverly* v. *Gatacre*, 1 Roll. Rep. 305. which was the caſe of a ſettlement, and ſubſequent conveyance for valuable conſideration, it is true that great ſtreſs was laid by the judges upon the queſtion, whether the ſettlor was indebted, or not, at the time of the ſettlement; but it is to be obſerved, that the *purchaſer*, in this caſe, was virtually a *creditor*, and took the conveyance as a ſecurity for his debt.

"one

"one great circumſtance, which ſhould always be attended to in theſe tranſactions, is, whether the perſon was indebted at the time he made the ſettlement; if he was, it is a ſtrong badge of fraud."

But it is not only in *Doe* v. *Routledge*, that the doctrine above conſidered has failed of confirmation; in the caſe of the *King* v. the *Earl* of *Nottingham*, *et al.* (5), it was forcibly impeached. To remove out of the way the ſolemn and well-conſidered opinion of the judges in *Warneford*'s caſe, a difference was taken between caſes, wherein the queſtion of fraud was integrally before the judges, and ſuch wherein the verdict of a jury had found an actual fraud, but contrived for another purpoſe, and againſt another perſon, than the purpoſe imputed, and the perſon complaining. *Warneford*'s caſe was, indeed, as was obſerved by the court, in *Tyrer* v. *Littleton*, above cited, particularly ſtrong, ſince, as the real intent was in itſelf fraudulent, it ſeemed to be within the reaſon on which the deciſions in Doctor *Ellis's*(6) and *Saunders*'s caſe (7), in Plowden's Commentaries were founded. The *Earl* of

(5) Lane, 47.

(6) Plowd. Com. 100. matters of the crown, happening at Salop.

(7) Plowd. Com. 473. the *Queen* v. *Saunders* & *Archer*.

(8) Lane, 44. *Nottingham*'s caſe (8), in which this reaſoning, from the criminal law occurs, was as follows: "Sir Robert Dudley intending to travel beyond the ſeas, by indenture for valuable conſideration expreſſed, but none paid (9), conveyed the manor of Killingworth, among other lands, to the Earl of Nottingham, in fee, and in the deed there was a proviſo, that, upon the tender of an angel of gold, all ſhould be void; and covenants were added, on the part of the bargainees, that they ſhould make all ſuch eſtates as Sir Robert Dudley appointed; after which, Sir Robert Dudley, by licence from the King, went to Venice. The bargainees, afterwards, made a leaſe to Sir Robert Lee, to the intent, that the Lady Dudley ſhould take the profits of part, for ten years, if the eſtate of the bargainees ſhould continue ſo long unrevoked. Upon the King's having notice of ſome mal-practices of Sir Robert committed on his travels, commanded him, by privy ſeal, to return, upon pain of forfeiture of all his lands, and afterwards upon his non-compliance, a commiſſion iſſued to enquire what lands and tenements, &c. Sir Robert Dudley had, or others upon truſt for him, or to his uſe,

(9) 1 Keb. 770.

and

and the jury found the facts ſpecially, but no fraud expreſsly; whereupon the King exhibited his bill, in the exchequer, againſt the bargainees, and Sir Robert Lee, their leſſee, who made a true diſcovery of all theſe facts; and it having been contended by the counſel for the defendant, that no fraud could be here imputed, ſince it could not be ſuppoſed, that when the Earl applied for a licence to travel, he foreſaw a countermand of his licence, or intended to commit a contempt by his refuſal to return, and ſo to ſave his lands by the conveyance of them to another: and *Warneford's* caſe having been cited to ſhew that, even where a ſpecial verdict had found actual fraud, but with a different object from that which was imputed, the ſufferer by the fraud, againſt whom no injury was intended, could not avoid the fraudulent act; it was anſwered by the King's counſel that "the contempt ſubſequent, was ſufficient proof of the precedent conjecture; that the conveyance was fraudulently made, to prevent the prejudice which might accrue by ſuch contempt, and that the judges ought to make ſuch conſtruction upon the ſubſe-

qent act." The before-mentioned caſes were cited from Plowden, to ſhew that the judges conſidered the firſt intent as proved by ſubſequent and ſecondary actions; and that, therefore, where, in *Saunders*'s caſe, the party, having an expreſs intent to poiſon his wife, delivered to her a poiſoned apple, which ſhe, not knowing it to be poiſoned, gave to her child, who died in conſequence of eating it, the indictment ſtated, that the ſaid Saunders, of malice aforethought, &c. *intended* to murder the ſaid *child*. So alſo, in the other caſe, cited from Plowden, where it was proved that the murderer intended to kill A. but that B. interpoſing in the affray, was ſlain accidentally; there, though, in truth, there was no primary intention to kill B. yet ſuch intention was imputed by legal collection. It was conſidered that there was *intentio legalis*, though not *actualis*.

The doctrine of thoſe caſes, ſo ably reported by Plowden, is exiſting law; but the propriety of the application of it, to queſtions of fraudulent intent, upon theſe ſtatutes of Elizabeth, may perhaps

perhaps be ſubject to doubt. The finding by the ſpecial verdict of the jury in *Warneford*'s caſe, of an intent, different from that which was charged, ſeems clearly to have prevented the application of the above ſtated rule, of criminal conſtruction, to the circumſtances of that caſe. Yet it is not to be ſuppoſed, that the jury found a verdict againſt the direction of the court, which, if it had recognized the ſaid principle, as applicable to the caſe before them, would have directed a verdict in favour of the queen. In the caſe above mentioned of *Tyrer* v. *Littleton*, the *redemiſe* was not made with an *unlawful* intent, and the real intent being found by the jury, the court could not *preſume* fraud againſt the verdict. The *arguments* in that caſe, however, go the whole length of *Warneford*'s caſe, which ſeems to have eſtabliſhed the rule, that, where a particular intent *is found by a jury*, though that intent be unlawful and fraudulent, yet, if a different intent is the ground of the charge, and a perſon not intended to be injured, makes application for relief, the fraudulent conveyance ſhall not be avoided. The effect of the finding of a jury, as in *Warneford*'s caſe,

caſe, is admitted in the caſe of the *Earl of Nottingham*; but it ſeems to have been there the prevailing opinion, that if proof appears of a fraud under the ſtatute, meditated againſt one, who does not come to complain, yet, that any perſon conſequentially injured thereby, in reſpect of any right or intereſt *expreſsly guarded by the ſtatute*, may apply the fraudulent intent (10) to himſelf, and that courts and juries ought to regard the ſubſequent matter as attracting, in legal conſideration, the malignity of the primary intention, and conſummating the incipient fraud. So far, perhaps, the doctrine is upheld by the ſtrong and general language of the ſtatute 13 Eliz. which ſeems to juſtify the obſervation of Sir William Jones (11), that if a man makes a fraudulent gift, to defraud a creditor ſolely, it is void againſt all thoſe who are within the ſtatute 13 Eliz. But it ſeems to be too great an extenſion of this doctrine, when it is admitted to confound the preſumptive evidence of intent in the conſtruction of theſe two ſeveral ſtatutes of Eliz. And it is clear, that if the rule above adverted to, as borrowed from the criminal law, be admitted in the interpretation

(10) The intent to deceive is not traverſable. Sid. 96.

(11) Palm. 415.

tation of theſe ſtatutes, it will warrant the legal deduction of intent under one, from the actual evidence of intent under the other. But, it ſhould ſeem, that as theſe ſtatutes were made for the protection of ſubſequent intereſts, and are, in that view, introductive of new laws, and ſince they have been conſidered by the moſt judicious expoſitors as effecting their object, by new and ſpecial rules of preſumptive evidence, it might be unſafe to apply to them any ſpecies of teſtimony, or principle of conſtruction, not practically involved in the exigency of their operation. Upon the whole, therefore, it ſeems, that, though the circumſtance of a man's being indebted, before making a voluntary conveyance or ſettlement, may be admitted as evidence, where the perſon conteſting it is within the ſtatute 13 Eliz. yet, notwithſtanding the *dictum* in *Doe* v. *Routledge*, the proof of ſuch a fact ought rather to prejudice than advance the claims of a *purchaſer*.

With reſpect to which caſe of *Doe* v. *Routledge*, we may be permitted generally to remark, that, beſides an intimation of doubt,

doubt, as to the grounds and propriety of the deciſions which have ruled notice to be inoperative in theſe caſes, and the importance which it has endeavoured to attach to the queſtion, whether the perſon conveying be indebted or not at the time of his conveyance, in caſes where the claim is made by a ſubſequent purchaſer, it contains ſome liberal notions on theſe ſtatutes of Eliz. which it is hoped will not propagate the ſpirit of emancipation among others, on whom the authority and ſcience of our anceſtors make but too weak an impreſſion.

SECTION IV.

THESE preliminary topics prepare us for the inveſtigation of the queſtion, whether fraudulent or not fraudulent, as ſuch queſtion is affected by the exiſtence or non-exiſtence of a valuable conſideration within the purview of the ſtatutes above-mentioned. Whoever reads theſe ſtatutes of Elizabeth will find little or no reaſon for the law they promulge, unleſs he ſees in the context of each of them the deſign of caſting upon unpurchaſed gifts and conveyances, at leaſt a *preſumption* of fraud, and the burthen of their own vindication. Venerable authorities have adjudged the want of apparent valuable conſideration to furniſh only a preſumption of the fraud intended by parliament, while great names have not been wanting to ſanction the doctrine that at leaſt in caſes falling within the ſta-

tute (*a*) 27th Eliz. the voluntarineſs of a conveyance is meant by the ſtatute to be identified with fraud; and that the want of ſuch conſideration as that ſtatute regards neceſſarily vacates the conveyance for the benefit of thoſe within the relief of the ſtatute. Theſe notions, which apparently contradict each other, are perhaps not ſo irreconcilable as they appear at firſt; and though they have kept the queſtion long vibrating between two oppoſite attractions, are capable of being

(*a*) In ſome of the inſtances already produced the courts have ſhewn a diſpoſition to give a ſtronger effect to the 27th Eliz. in favour of purchaſers, than to the 13th Eliz. in favour of creditors; as a reaſon for which Lord Hardwicke, in *Ruſſel* v. *Hammond*, 1 Atk. 15. obſerves that in the caſes under the 27th Eliz. a man has actually paid money for the eſtate. See alſo the diſtinction taken by Lord Hardwicke in *Townſend* v. *Windham*, 2 Vez. 10. and ſee 3 Atk. 412. But in the Treat. of Eq. 1 vol. 268. laſt Edit. it is ſaid by the author, that voluntary conveyances are void by the expreſs letter of the ſtatute 27th Eliz. and ſee 2 Vern. 327. *Shaw et al.* v. *L. Standiſh*; a diſtinction, however, which ought to be cautiouſly admitted, and can only be maintained to a limited extent, for the proviſo in the 13th Eliz. which explains the purview of the act, excepts only eſtates conveyed upon *good* conſideration, and *bona fide*.

approxi-

approximated by an attentive compariſon of their principles.

Although it be admitted, in conformity with the more rigorous opinion, that a conveyance plainly voluntary, coupled with a ſubſequent endeavour to ſell, is concluſive evidence of fraud as againſt the purchaſer, and muſt be ſo explained to, and found by a jury; yet the queſtion is ſtill open as to what ſhall be conſidered *voluntary* in the full and obnoxious ſenſe which the context of that ſtatute imports. We may remark, without ſtraining after ſubtleties, that the word *voluntary* has many ſhades. There are many degrees between conveyances ſo abſolutely voluntary as to be without any interchange, condition, equivalent, or mutuality of intereſt to ſupport them, and conveyances in which the actual conſideration of money, or trafficable price, is only wanting. An apparent want of conſideration for the transfer of an eſtate may, it is true, upon the moſt reaſonable conſtruction of the ſtatute, raiſe a preſumption of fraud; but we may, perhaps, without hoſtility to either of the contending

ing opinions above ſtated, obſerve, that this preſumption of fraud, ariſing from the want of the actual conſideration of price, may be repelled by many obvious inducements of intereſt in the parties, which, though falling ſhort of a balanced equivalency, may yet take the caſe out of the ſtatutes. A reconciling medium may perhaps be diſcovered, at leaſt in a great majority of inſtances, (which is all that can be hoped for on controverted legal points) between apparently diſcordant determinations on this ſubject. When authorities occur, in which the rule is rigorouſly laid down concerning the effect of the voluntarineſs of a conveyance or ſettlement, we ſhall ſeldom violate the principle of the caſe by contracting the import of the word to the total want of all ſubject of ſtipulation or condition between the parties, and, where preſumptive evidence only is allowed to the voluntarineſs of a conveyance, by enlarging its ſenſe ſo as to embrace within it all ſuch caſes as are marked only by the mere want of ſuch oſtenſible conſiderations as move the parties to a regular contract. The diverſity

verſity of doctrine on this ſubject ſeems partly owing to the ambiguous and unſettled meaning of the word *voluntary*, and the controverſy has perhaps ſometimes exiſted without a radical difference of opinion. It may be found, that in many caſes wherein there appears an oppoſition of principle, there is in truth only a difference in the ſcope and boundary aſcribed to a ſingle term.

Till the word *voluntary* has a more ſettled meaning in our law, a more ſparing uſe of it than is generally made, might be better for the elucidation of the preſent ſubject. It has not been adopted by the ſtatute, and therefore has no technical propriety on that ground to recommend it. Delivered from its verbal ambiguity, the ſubject will be beſt conſidered by attentively regarding the reaſons on which the reported deciſions may be maintained by the facts and circumſtances belonging to the whole of each caſe, without too implicitly attending to the literal expreſſion, or always bounding our views to

the profeſſed ground of the judgment. His will be a fortunate caſe, whoſe inveſtigations will furniſh him with a certain criterion on this fluctuating ſubject. Theſe obſervations aſpire only to ſhew that, as a general rule reſulting from a compariſon of the different caſes in the books, from which any clear grounds of deciſion can be extracted, it may be concluded, that a preſumption of fraud properly ariſes upon the ſtatute 27th Eliz. cap. 4. wherever a conveyance is made without a *plain* conſideration of value; which preſumption may be repelled by ſhewing, that the tranſaction or treaty on which the conveyance was founded, virtually contained ſome conventional ſtipulations, ſome compromiſe of intereſts or reciprocity of benefits, that point out an object and motive beyond the indulgence of affection or claims of kindred, and not reconcileable with the ſuppoſition of intent to deceive a purchaſer. But that where no reciprocation of benefit, no ſubſtantial interchange, compromiſe, or condition, can be made to appear, and the caſe ſhews on one ſide a perfect blank, or where no induce-

ment appears but the ſuſpicious attraction of proximity of relationſhip, ſuch a conveyance, coupled with a ſubſequent negotiation for ſale, is concluſive evidence of the ſtatutory fraud; and imperative upon courts and juries.

Without ſome principle of ſteady direction the progreſs through the apparent contradictions in the caſes upon this queſtion is weariſome; and the ſearch is in creaſed in difficulty by a diſagreement in the ſentiments expreſſed at different times by the ſame judges. In the before-mentioned caſe of *Townſend* v. *Windham* (1) we find the following obſervation of Lord Hardwicke upon the ſtatute 27th Eliz. c. 4. "Every voluntary conveyance made, where afterwards there is a ſubſequent conveyance for valuable conſideration, though there be no fraud in that voluntary conveyance, and the perſon making it be not at all indebted, yet the determinations ſay that ſuch mere voluntary conveyance is void at law by the ſubſequent purchaſe for va-

(1) 2 Ves. 10.

luable conſideration (*b*)." But in the caſe before cited of *Ruſſell* v. *Hammond* (2), his Lordſhip ſhewed himſelf to be aware of the judicial opinions in the caſes of *Sir Ralph Bovey* (3) and *Lord Tenham* v. *Mullins* (4), and ſubſcribes to the doctrines of thoſe caſes and others which will be hereafter noticed. The deciſion in *White* v. *Huſſey* (5) agrees with the above opinion of Lord Hardwicke, cited from the caſe of *Townſend* v. *Windham*; the commiſſioners all agreed, that they might decree a conveyance to be fraudulent merely for being voluntary, and that without any trial at law.

(2) 1 Atk. 15.

(3) 1 Vent. 193.

(4) 1 Mod. 119.

(5) Prec. in Can. 15.

Again, in the caſe of *Gardiner* v. *Painter* (6) it was ſaid, that it can never be a queſtion, whether a *voluntary* ſettlement be good

(6) Sel. C. in Temp. Ld. King.

(*b*) In the caſe of *White* v. *Sanſom*, 4 Atk. 412. Lord Hardwicke obſerved, that he had hardly known an inſtance where a voluntary conveyance had not been held fraudulent againſt a ſubſequent purchaſer; and ſee his Lordſhip's opinion in *Bennet* v. *Muſgrove*, 2 Vez. 57. to the ſame effect as to the conſtruction of fraudulent conveyances in a court of law.

againſt

againſt a purchaſer. In favour of this conſtruction the caſe of *Hungerford* v. *Earl* is frequently mentioned in the books (7); and it is further countenanced by the opinion of the Court pronounced by C. J. De Grey in the caſe of *Goodright* v. *Moſes* (8). We may obſerve too, that the learning of Lords Hardwicke (9) and Lord Mansfield (10) drew from them reſpectively an admiſſion, that the authorities had greatly inclined to the doctrine of the foregoing caſes.

(7) 2 Vern. 264.

(8) 2 Black. 1019.

(9) 2 Ves. 10.

(10) Cowp.

Theſe caſes, however, are balanced by others expreſſed in very different language. A contrary doctrine is by ſome thought to be inſinuated in *Fitzjames* v. *Moys* (11), where it was held that the firſt conveyance, which was purely voluntary, *might* be fraudulent. The caſe of *Jenkins* v. *Kemys* (12) contains an opinion of Lord Hale, that a voluntary ſettlement was only to be taken as preſumptively fraudulent againſt a ſubſequent purchaſer. In Sir *Ralph Bovey's*

(11) 1 Sid. 133.

(12) 1 Lev. 150. 237.

(13) 1 Vent. 293.

(14) 1 Ch. Caſ. 99.

(15) 1 Ch. Caſ. 216.

(16) 2 Lev. 146. The ſenſe requires the word *voluntary* to be ſupplied in the opinion pronounced by Ld. Hale in this caſe.

caſe (13), the effect of the voluntarineſs of a conveyance in the opinion of the ſame judge was confined to preſumptive evidence. In *Douglas* v. *Ward* (14) we have alſo the authority of the Court for the ſame doctrine on voluntary conveyances. It was admitted in *Holford* v. *Holford* (15), that a voluntary conveyance was *primâ facie* fraudulent againſt a conveyance for conſideration. Again, in *Lavender* v. *Blackſtone* (16), Lord Hale maintained the admiſſibility of circumſtances to explain the motives of a voluntary conveyance, and to repel the preſumption of fraud, which he allowed the voluntarineſs of a conveyance to import (*d*). The caſes of *White* v.

(*d*) The vague and flexible ſenſe given in the caſes to the word *voluntary* will be obſerved by the diligent reader; and it is worthy of remark, that Lord Hale, who, in the caſes quoted in the text, ſo clearly maintains the voluntarineſs of a conveyance to be preſumptive evidence only of fraud, in Sir *Anthony Bateman*'s caſe 1 Mod. 76. ſeems by his uſe of the word *voluntary* to ſuppoſe in it a neceſſary implication of fraud under the ſtatute.

Stringer,

Stringer (17), Lord *Tenham* v. *Mullins* (18), *Garth* v. *Mois* (19), and *Sagittary* v. *Hide* (20), all lean to the ſame doctrine.

(17) 2 Lev. 105.
(18) 1 Mod. 119.
(19) 1 Keb. 486.
(20) 2 Vern. 44.

If we drop for ſome time the word *voluntary*, and thus relieve the queſtion from verbal embarraſſment and dubiety, we ſhall ſee perhaps in the matter of the greater number of the caſes decided a true but tremulous line of diſcrimination, which, though often vibrating with the unſteadineſs of language, preſerves a tolerably conſiſtent courſe through the principles and reaſonings maintained by the Courts. A preponderancy of caſes, numerous and authoritative enough to create a prevailing rule, where univerſality cannot be obtained or expected, may appear perhaps to have eſtabliſhed the neceſſity of ſome ſtipulation or condition, ſome expreſs or virtual contract, or ſomething in the nature or ſpirit of a contract, operating either immediately upon a conveyance or limitation, or primarily upon the deed or inſtrument containing it, to render it ſafe and effectual as againſt a ſubſequent ſale. Whether theſe ingredients have their effect, by

proving the conveyance not *voluntary* in the more reſtricted ſenſe given to that word, or not fraudulent, where the term *voluntary* is taken in its greateſt latitude, as comprehending all caſes wherein the plain characters of a ſale and purchaſe, or the conſideration of marriage, do not appear, is of ſmall importance. In either ſuppoſition, the want of a real viſible conſideration will produce ſimilar conſequences—the thing is perhaps the ſame in effect and ſubſtance. Whether the queſtion ariſes in a Court of Equity or Law, neither of theſe judicatures will be diverted by a word of ſuch variable import, not occurring in the ſtatute itſelf, from applying the proviſions of the act to the particular caſe before them, with a true intelligence of its ſcope and purview, and upon thoſe legal and conſervatory principles of conſtruction which agree with the nature and neceſſity of fixed and general laws.

It may ſafely be affirmed, that in a Court of Common Law, whether the queſtion be produced upon a demurrer or ſpecial verdict,

verdict (*e*), or receive its ultimate determination from a jury, (for the caſes ſeem to ſhew that it may be for the deciſion of either branch of judicature, according to the ſhape in which it ariſes, and the points of enquiry it involves), the *total* want of conſideration as againſt a ſubſequent purchaſer, has in general been regarded as a concluſive argument of fraud.

(*e*) In *Butler* v. *Waterhouſe*, 2 Show. 46. the caſe came before the Court upon a ſpecial verdict, finding the deed of ſettlement with a power of revocation; and it was made a queſtion, whether the Court could judge of fraud under the ſtatute 27th Eliz. c. 4. and to ſhew, that they could, *Standen* v. *Bullock* was cited, 3 Co. 82. Brownl. 190. Bridgeman 23. In *Saper* v. *Jakes*, 2 Brownl. 188. the defendant pleaded not guilty to an action of trover, and gave in evidence an aſſignment of a term to him with power of revocation, and the court directed the jury that this was fraudulent within the 27th Eliz. And it was ſaid by Harris Serjt. and not denied by the court, in *Tyrer* v. *Littleton*, 2 Brownl. 188. that where the court may direct the jury to find fraud, there they may judge, upon the ſpecial matter found by verdict, whether fraudulent or not. Lord Coke's opinion in that caſe turned upon the jury's having found a different intent from the intent charged; and the other judges admitted that a *power of revocation* was fraud apparent, and needed not to be averred *Sed Qu.* as to the diſtinction. In *Burrel*'s caſe, 6 Rep. 72. the court directed the jury to find fraud. *Croſs* v. *Fauſtenditch*, Cro. Jac. 180. and *Roe* v. *Mitton*, 2 Wilſ. 356. were upon ſpecial verdict, and no doubt as to the point of juriſdiction. This power of the court, however, was negatived by the Bench in the Earl of *Nottingham*'s caſe, Lane 48.

SECTION V.

WHAT *degree* or *deſcription* of *inducement* is a *conſideration* ſufficient to ſupport a ſettlement againſt a ſubſequent ſale, is a point here to be enquired into. It ſeems hardly neceſſary to add a caution againſt confounding the conſideration, which is requiſite under the ſtatute 27 Eliz. with that ſort of conſideration which is neceſſary to raiſe an uſe, but yet ſomething, by way of clearing the ground, may not be altogether without utility. In the caſes of (1) *Watts* v. *Bullas*, and (2) *Oſgood* v. *Strode*, wherein the aſſiſtance of the court of chancery was prayed in behalf of volunteers, related by blood to the grantor, it was argued, that, there being ſuch a conſideration, as, upon a covenant to ſtand ſeized, would have raiſed an uſe, the court had a good analogous foundation for affording relief, upon the ground that uſes before the ſtatute 27 H. 8. were truſts, and that a truſt ought now to be raiſed, by whatever

(1) 1 P. Wms. 60.
(2) 2 P. Wms. 254.

before

before the ſtatute would have raiſed an uſe. The weight or ſucceſs of this argument does not appear by the report of either of thoſe caſes; but ſome time afterwards, in (3) *Goring* v. *Naſh*, "it was obſerved by Lord Hardwicke, that Lord Keeper Wright reaſoned too largely upon this point, in *Watts* v. *Bullas*, owing to his being new in that court, and purſuing the maxims of law too far, and that a court of equity did not regard the conſideration to raiſe an uſe." But if this analogy could prevail in equity among volunteers, the ſtatutes of fraudulent conveyances have certainly deſtroyed its applicability to caſes wherein parties claim upon conſiderations of value.

(3) 3 Atk. 189.

Even the valuable conſideration neceſſary to a bargain and ſale may, nevertheleſs, be no valuable conſideration under the ſtatute 27 Eliz. (*a*). The badges of

(*a*) The conſideration under the ſtatute 27 Eliz. is here ſeparately adverted to, becauſe it is the moſt obviouſly diſtinguiſhable from the conſiderations to raiſe uſes. Family ſettlements and advancements to children, it has been already ſhewn, are good conſiderations as againſt creditors under the 13 Eliz. where the ſettler is not indebted at the time.

fraud

fraud under that ſtatute may accompany it, without reſcinding its effect of raiſing the uſe: a ſecret power of revocation, upon a colourable condition, would not, it is apprehended, root up ſuch uſe *ab initio*, without the ſtrong interference of this Act of Eliz. in favour of honeſt purchaſers. The conſideration to raiſe an uſe upon a covenant to ſtand ſeized, affords no protection to the uſe when raiſed; and though ſuch a conſideration may accidentally become evidence to repel a charge of fraud in certain caſes, yet its ſpecial and characteriſtic agency or virtue, exhauſts itſelf in giving birth to the uſe. With reſpect to the uſe ariſing upon a feoffment, a mere nominal price, and the acknowledgement expreſſed in the deed, without any actual receipt, is ſufficient (4).

(4) *Wilkes v. Lauſon*, Dyer, fo. 169 a. p. 22. See Valliant's Edit. and ſee *Doct. & Stud.* 97, et ſeq.

Theſe conveyances have their different degrees, and ſome their diſtinct ſorts of conſideration; but the conſideration neceſſary, under the ſtatute 27 Eliz. to maintain the validity of a conveyance, as againſt a ſubſequent purchaſer,

is of equal exigency in *all* conveyances, and, therefore, cannot be the ſame with that diſtinct eſſential conſideration of any one, from which is derived its characteriſtic operation. Thus the valuable conſideration of the bargain and ſale, will carry the uſe to ſtrangers (5), while the valuable conſideration under this ſtatute, ſtops ſhort of thoſe limitations to which it has not a viſible and clear applicability. Caſes of ſettlements may be ſhewn, it is true, wherein relationſhip by blood has been admitted to ſupport, againſt ſubſequent purchaſers, collateral and remote limitations out of the path of the direct matrimonial conſideration; but it is apprehended, that an attentive examiner of theſe caſes, will, in the main, diſcover that parents or collateral relations have been induced to become parties to theſe ſettlements, with motives capable of being explained and evidenced by their connection in blood with theſe *ulterior* objects, whoſe benefit or proviſion may reaſonably be ſuppoſed to have been made by them the ſubject of ſtipulation, in the general compromiſe or adjuſtment

(5) Vid. 2 Roll. Abr. 784. pl. 7.

adjuſtment of intereſts, which often takes place on a marriage ſettlement.

It may not be improper here to call the reader's attention to the caſe of *Croſs* v. *Fauſtenditch* (6), which is an inſtance of a partial avoidance of his own ſettlement, by the ſettlor himſelf, while intending to act, by virtue of a power contained in the ſame; and the caſe exemplifies, as well the extent and limit of the conſideration of blood and affection, in raiſing an uſe, as the mode in which the ſtatute 27 Eliz. operates. The caſe was thus in effect: A. by a covenant to ſtand ſeized to uſes, made a voluntary conveyance, within the ſtatute 27 Eliz. with a power of revocation (*b*), and thereby limited an uſe to himſelf for life, with a power of leaſing for twenty-one years. Afterwards, in conſideration of

(6) Cro. Jac. 180.

(*b*) The revocation afterwards ſpoken of, as made by the leaſe in this caſe, could not be intended a revocation by virtue of this power, for the leaſe muſt have taken effect, by *avoiding pro tanto* the ſettlement, and every clauſe contained in it; and the power of revocation could not at once be the fraudulent act, and the means by which the fraudulent act was defeated.

a fine

a fine paid, A. made a leaſe for twenty-one years, and the principal queſtion was, whether the leaſe made, was a leaſe ſupported by the power of leaſing, or took effect in avoidance of the ſettlement, as far as the term extended. And, although it was urged, that if it could not have its operation, by virtue of the leaſing power, it yet might take effect out of the ſettlor's life intereſt, which might endure beyond it; yet it was reſolved, that the leſſor was as tenant in fee, when he made the leaſe, *quoad the leaſe*, for the leaſe might extend beyond the life, and was unſupported by the power. And as the ſettlement was without conſideration, it was *revoked*, i. e. *avoided*, as to the leaſe which was ſupported by a conſideration of value. It could not take effect by the power, becauſe the power, which was only an uſe, could not riſe upon the covenant to ſtand ſeized, for the leſſees were ſtrangers to the conſideration of blood, and therefore could take no benefit of ſuch an eſtate (*c*).

There

(*c*) The caſe, however, it is conceived, might have carried the doctrine a ſtep further; for it would have availed

There are caſes which have a tendency to melt down the particular proviſions of theſe acts of Elizabeth, into an identity of effect, with the inherent remedial efficacy againſt fraud, reſiding in the common law of England. And the principle of reaſoning on which this idea is bottomed ſeems to be, that where good ſolid and prudential inducements may naturally have dictated the ſettlement or conveyance, the ſenſible conſtruction of the ſtatutes of Eliz. againſt fraud will not invalidate its operation. But while ſuch poſitions may wear the appearance of liberality of thought, and attract by the ſimplicity of their theory the general ſtudent, they leave the profeſſional enquirer without any practical rule to direct him. Our judgment muſt ſtill be decided by ſome ſettled criteria, and theſe criteria cannot be ſettled

availed nothing, if the leſſees had actually been privies in blood, ſince the power was void in its creation by reaſon of the uncertainty of the perſon to be benefited thereby; and ſo it was reſolved in *Mildmay*'s caſe, 1 Rep. 176 b. For the rule of law is, that a good *execution* will not avail, where the *conſtitution* is defective. Hob. 151.

with

with any approach to certainty, unleſs the leaſt fallible teſts are ſifted from the more ambiguous, and collected and claſſed into rules with ſomething like the conſtancy of ſcience. There is ſcarcely an inſtance of a ſettlement made after marriage where much may not be ſaid on the ſcore of prudential and honourable motives. If a married man have made no proviſion for his wife and the mother of his family, but what is ſubject to the arbitrary motions of his own mind, or the fluctuations of his fortune, there is ſurely a ſtrong ground for ſuppoſing him to be honourable and ſincere in his apparent anxiety to ſecure, by an irrevocable inſtrument, ſuch a proviſion for her and his family as may ſurvive his own failures, loſſes, or caprice. Yet the determination in *Douglas* v. *Ward* (7), *Colville* v. *Parker* (8), and *Goodright* v. *Moſes* (9), are, it is apprehended, the law of the preſent hour. If the deſigns of fraud are in the old proverbial language hatched *in cava arbore et opaca*, we may obſerve, that it makes choice of a tree, the depth of whoſe umbrage, while it favours concealment, gratifies

(7) 1 Chan. Ca. 99.
(8) Cro. Jac. 158.
(9) 2 Black. 1019.

tifies the eye of the ſpectator. Colourable pretexts and appearances are never wanting to the ſkilful artificer, but ambiguous morality muſt not diſarm the vigilance of the law. If we look narrowly into the caſe of *Doe* v. *Routledge*, we may perceive, that ſome of the caſes adverted to by Ld. Mansfield in ſupport of his opinion, accord with that deſcription or claſs of ſettlements which in *Roe* v. *Mitton* (10) are with great authority and appearance of reaſon denied to be voluntary. The two caſes, perhaps, fundamentally agree in their conception of the thing, but they differ in the ſenſe in which *voluntary* is to be underſtood, which covers a much wider area in *Doe* v. *Routledge* than is aſſigned to it by the caſe of *Roe* v. *Mitton*. We ſhall find indeed in general that the caſes and authorities in the books will be at eternal hoſtility, unleſs we allow for the varying degrees of dilatation and contraction in the import of this term. It was further obſerved by his Lordſhip in the ſame caſe of *Doe* v. *Routledge*, as a reaſon for conſidering ſuch ſettlements, as he had juſt before alluded to, as out of

(10) 2 Will. 356.

the ſtatute, " that they are good at the time of making them." But with great veneration for the authority of that judge it may be remarked, that a ſettlement may be *good* with reſpect to this ſtatute 27th Eliz. at the time of making it (if by *good* be meant valid) againſt the ſettlor and his repreſentatives, and againſt all exiſting claims whatſoever, and yet *bad* as againſt a perſon afterwards coming in upon valuable conſideration. If by *good* be meant *honeſt*, we cannot but ſee that, whether the tranſaction be honeſt or otherwiſe, is the very queſtion itſelf upon the ſtatute, which, when an eſtate, having before been the ſubject of a voluntary donation, is offered to ſale, does not conſtrue a ſubſequent act ſo as to make *that* fraudulent by matter *ex poſt facto*, which was not fraudulent at firſt, but views theſe two acts as integral parts of *one* contrivance, and as compound evidence of fraud from the beginning.

SECTION VI.

IT may be uſeful to the principal ſubject, to ſay ſomething, here, upon the *conſideration* to raiſe *uſes* and *aſſumpſits*, not ſo much by way of furniſhing analogies, as of pointing out diſtinctions.

The origin of uſes is in much obſcurity. Many writers agree in deducing it from the civil law, which has always entertained a diſtinction between the poſſeſſion and the uſufructuary enjoyment; and they agree in aſcribing to the clergy the introduction of them among us, with the view of evading the ſtatutes of mortmain, which ſtatutes thoſe expounders of the civil law conſidered as not binding in conſcience, and as being ſubject, in favour of their own order, to the equitable affirmance of ſecret uſes in oppoſition to their ſpirit and intention (1). In debating the 22d queſtion, however, in the 2d dialogue of the *Doctor* and *Student*, the Divine did not carry the

(1) 2 Black. Com. 271. 2 Leon. 74. Lord Raym. 291.

common law uſes up to the fountain of Roman juriſprudence; and the Student ſeemed to think that the diſtinction between the legal ownerſhip and the uſufructuary intereſt or right to the profits, was coeval, in our law, with the acquiſition of property. But it ſeems to be of greater importance to aſcertain the requiſites to the validity of theſe uſes than the period of their adoption.

It was ſaid by Lord Bacon, in his reading on the ſtatute of uſes, that there is no reaſon in the law why a deed ſhould not raiſe an uſe without any conſideration; but he added, that there is a reaſon in chancery becauſe no court of conſcience will inforce *donum gratuitum* (2). But whether an uſe were well raiſed, became a proper queſtion in courts of law, after the ſtatute of uſes; for, unleſs the conſideration would have raiſed the uſe in chancery before the ſtatute, there would be no uſe *in eſſe* for the ſtatute to transfer into poſſeſſion. In caſes wherein the poſſeſſion was not tranſmuted by matter of record, or ſolemn livery of ſeizin, the law look-

(2) Read. on Stat. of Uſes, 310, & ſeq.

ed ſtill to the conſideration, and though a covenant executory imported in itſelf a conſideration, ſo as to ſuſtain an action for damages, yet it had not power to transfer a preſent intereſt in land without the conſideration of blood working together with its inſtrumental efficacy. A fine and recovery, which are judicial tranſactions upon record, have the ſame power, as a feoffment, to raiſe an uſe without any actual conſideration moving between the parties. By theſe authentic modes of conveyance the eſtate in the land is paſſed inſtantaneouſly, together with the uſe, which remains in the feoffee, conuſee, or recoverer, unleſs for want of conſideration expreſſed or implied, it reſults back to the perſon from whom it moved. By theſe acts of notoriety and ſolemnity the uſufructuary poſſeſſion is transferred without actual conſideration; and for this reaſon the uſes, when declared upon theſe modes of alienation, (and they may be declared without expreſſing any conſideration at all) (3), are ſaid to ariſe out of the conveyances or aſſurances themſelves. But upon the bargain and

(3) 1 Lord Raym. 290

and ſale, and covenant to ſtand ſeized, the uſe ariſes purely out of the conſideration. Thus if A. covenants in conſideration of the marriage of his daughter with the ſon of B. to levy a fine to the uſe of the daughter and ſon, and the fine is levied accordingly, though the marriage ſhould not take effect, the uſes of the fine will ariſe. But if A. inſtead of levying a fine, had covenanted to ſtand ſeized to uſes, the reſult would have been different; for if that which was the conſideration do not happen, there is nothing to raiſe the uſe on ſuch covenant to ſtand ſeized (4). After a feoffment is made, the feoffor has only to guide the equity or uſe of the eſtate (*d*). But in the bargain and ſale or covenant to ſtand ſeized, an uſe is to be *raiſed* and *originated*, and not *merely directed*. And this ſeems to be the moſt ſatisfactory reaſon for the peculiar ſtreſs laid upon the conſideration in ſuch imperfect conveyances.

(4) Vid. Leon. 138.

(*d*) An uſe, when once raiſed, may be paſſed by grant to a ſtranger without conſideration, but there muſt always be a good conſideration to create it de novo. Vid. Doct. and Stud. Dial. 2. Ch. 22, 23.

The conſideration of the bargain and ſale reſts wholly on the contract, and as the bargain and ſale of goods and chattels will have no binding effect, ſo as to raiſe an action at law without valuable conſideration given, ſo neither before or ſince the ſtat. 27 H. 8. c. 10. of *Uſes*, or 27 H. 8. c. 16. of *Inrolments*, will it raiſe an uſe of land, unleſs it be grounded on an actual recompence. And as a bargain and ſale of chattels (*e*) may, at this day, if for valuable conſideration, be good, without deed or writing, ſo, before the ſtat. of inrolments, a bargain and ſale of lands, according to Lord Coke, was good by parol at the common law (5). And ſo great was the efficacy of the conſideration of the bargain and ſale at common law, that, before the ſtat. of uſes, a bargain and ſale *generally*, without the words *heirs*, carried the whole eſtate to the bargainee (6). But as the conſideration of the conveyance by bargain and ſale imported ſome

(5) 2 Inſt. 675. and vid. 1 Leon. 18.

(6) Vid. 1 Rep. 87 b.

(*e*) If a ſpecific delivery accompanied the transfer of property, it was a gift, and was ſaid to be binding without any conſideration. Vid. Plowd. 302.

cere-

ceremony and act of notoriety which certified the alteration of property to thoſe whoſe rights or tenures were conſequentially affected, it poſſeſſed a virtue, at common law, above the conſideration, whereby uſes were raiſed upon the ſtrength of mere proximity of blood, which, according to the prevailing opinion, required the ſolemnity of a deed of covenant (*f*) to render it effectual; and it ſeems as if the obligatory ſtrength of the inſtrument was incorporated with the conſideration of blood, to compoſe the validity and efficacy of the conveyance.

It appears that before the ſtatute of uſes, 27 H. 8. c. 10. the covenant to ſtand ſeized to an uſe, afforded a two-fold remedy. Damages, for the breach, were recoverable at law, but a ſpecific performance was only compellable in equity (*g*): but, by that

(*f*) Conſult the caſes cited in *Page* v. *Moulton*, Dyer 296. laſt edition, and Sheppard's Touchſt. 483; ſee alſo Sir Thomas Raym. 47. Lord Raym. 290. 2 Com. Dig. 569. Gilb. Uſes, 60. Moore 688. Hob. 313. and 2 Wilſ. 75.

(*g*) Uſes, which are ſaid to have originated in covin, appear, for ſome time, to have been a very precarious and

that ſtatute, the uſe being executed, the remedy by action was ſuperſeded; for, as the uſe was transferred by *parliament*, it could not be transferred by the *party*. And though, perhaps, where *no uſe* is raiſed, an action may yet lie upon the covenant, yet, where the covenant operates to legitimate the uſe, the force of it is ſpent in the immediate execution of the uſe by the ſtatute. And ſo diſtinct has the executory covenant been held from the covenant to ſtand ſeized, that it was the opinion of Lord Hobart, that when a covenant ſounds in action only, it ſhall not avail to the creation of an uſe (7). It ſeems clear then, that, although a deed of covenant may be neceſſary to give activity to an uſe, yet, that the uſe receives its eſſential virtue immediately from the conſideration. Bromley, in his argument in the caſe of *Sharrington* v. *Strotton* (8), urged the ſolemnity of the deed as a ſufficient foundation for the uſe; but the

(7) Vid. Winch. 1. 60, 61. Plowd. Com. 307. Finch. 158. and vid. Sid. 27. and the opinion of Lord Hobart, there cited and confirmed, by C. J. Bridgman.

(8) Plowd. Com. 308.

and ill aſcertained intereſt. It ſeems that the ſubpœna was an invention of an eccleſiaſtical chancellor, in the reign of Ric. 2. and it was not till Edw. 4th's time, that the proceſs in bill and ſubpœna became the daily practice of the court of Chancery. Vid. 3 Blackſt. Com. 52.

judges

judges were ſilent upon that ground, although called upon for the reaſons of the judgment; and, indeed, it ſhould ſeem a manifeſt violence done to its own rules, if the law could allow this virtue to a mere inſtrument, unattended by livery of ſeizin, or matter of record. But, together with the remedy by action, the ſpecific performance of the uſe in chancery was abſorbed in the efficacy of the ſtatute of uſes, ſo that, perhaps, at this day, the covenant to ſtand ſeized has loſt its obligatory, and retains merely its declaratory force. We may add, too, that, if the covenant alone, without the conſideration, could have given birth to an uſe, a man might raiſe an intereſt in another, when he had none in himſelf, by covenanting to ſtand ſeized to the uſe of another, of land, which he ſhould hereafter purchaſe. But, by the rule of law, no covenant or bargain and ſale, can paſs an uſe, if the covenantor or bargainor has not ſeizin of the eſtate at the time of ſuch covenant or bargain and ſale (9): and ſuch covenant or contract would have been equally void in equity before the ſtatute: ſo that, in ſuch caſe, the uſe could never riſe to be executed by the ſtatute

(9) 2 Roll. Abr. 79. Cro. El. 401.

ſtatute of uſes, which created no new eſtate in the uſe, but executed the eſtate to the uſe created. And ſo ſtrict is the law in requiring a preſent ſeizin, out of which the uſe is to ſpring, that a bargain and ſale of land, with a way over *other* land, whereof the bargainor is alſo ſeized, without words of *grant*, has been held not to paſs the intereſt (10). For the way not being in exiſtence at the time of the bargain and ſale, if it were to take effect in the bargainee, would paſs without any previous ſeizin in the bargainor. But a rent charge *de novo* may be ſo created, becauſe it is not collateral to, but comes out of the land whereof there *is* a ſeizin.

(10) Cro. Jac. 190.

We muſt at this day look upon theſe imperfect modes of conveyance as rendered perfect by the ſtatute of uſes; and the *remedies* at law and in equity, upon the contract or conſideration, wholly gone, as far as they reſpected the *effectuation* of the uſe; and that, though, out of regard to the conſideration, if a bargain and ſale had been made at common law, to a man *generally*, without mention of his *heirs*, a court of equity would have decreed an eſtate

eſtate-in fee; yet, that, ſince the ſtatute 27 H. 8. c. 10. the bargain and ſale has become a ſtrict legal conveyance, which carries at once the eſtate in the land, and that, in a caſe of ſuch general diſpoſition, the *inheritance* would not now paſs to the bargainee (11).

(11) Vid. 1 Rep. 87. b. 100. b.

The difference in their legal conſequence to ſtrangers, between conveyances and contracts, accounts, in part, for the difference in the conſideration, neceſſary in our law, to raiſe the uſe upon theſe diſpoſitions of property, and to ſupport an actionable promiſe; for as the legal validity of a promiſe depends only upon the evidence of real intention to be bound, and not at all upon the publicity of the contract, many circumſtances of private inducement may become the foundation for an *aſſumpſit*, which would fail as the conſideration of a bargain and ſale, or covenant to ſtand ſeized, from the want of a ſufficient oſtenſibility in the motive. On the other hand, valid conſiderations to uphold bargains and ſales, and covenants to ſtand ſeized to uſes, would be inſufficient to ſuſtain actions upon promiſes by

by reaſon of their ambiguity, as an indication of deliberate intention to become bound to the performance. So the conſideration of natural affection is inadequate to ſuſtain a promiſe, and the obligations of conſcience, which will ſupport an *aſſumpſit*, will not raiſe the uſes, either upon covenants to ſtand ſeized, or bargains and ſales. It is true that the contracts on which *aſſumpſits* are founded, are, in many points, governed by the ſame rules as the conſideration of the bargain and ſale, but they differ broadly in this, that, whereas, in the bargain and ſale, the foundation of the contract is the mutuality of recompence (12), the conſideration for an *aſſumpſit* may ariſe on one ſide only; and it is enough if loſs or charge accrues to the promiſee, without benefit or profit to the perſon promiſing (13). And, again, a promiſe will be good upon a conſideration paſt, if moved by precedent requeſt (14). But the contract of the bargain and ſale is wholly of an *executory* nature.

(12) Vid. Plowd. Com. 303.

(13) Vid. Doctor and Student, Dial. 2. c. 24. 17th edit. p. 179.

(14) Vid. 1 Roll. Abr. 11, 12. 13. Brooke Action, 7. pl 88. 1 Ro. Rep. 381. Cro. Car. 499.

The bargain and ſale, and covenant to ſtand ſeized, leave nothing new to be done, ſo that the uſe, once raiſed and perfected, is not liable

liable to be deſtroyed by ſubſequent events: whereas, promiſes, being proſpective to a future act, leave room for intervenient events, by deſtroying the conſideration, to anticipate the execution of the contract. It is a plain ethical rule, that whatever a man ſeriouſly promiſes, he is morally bound to perform; the conſideration, therefore, by which promiſes are moved, is not in our law, nor can be in any law, of the eſſence and conſtitution of the promiſe itſelf; it is a medium only for diſcovering the ſerious intention of the party, at the time of making it, to be bound to the performance: But the dignity and force of the conſideration itſelf, in theſe creations of new uſes, is intrinſically regarded by the law, which looks watchfully at thoſe acts that are to diſappoint the expectation of heirs, and to produce relative conſequential changes in the tenures and rights of others. A promiſe which gives a *right* only to the thing, and not the *thing* itſelf, may ſuſpend its performance upon the *proof* of its reality, and time is given for moral obligations to be aſcertained by facts, ſo as to become an evidence of grave and intentional promiſe: but, where, as in

theſe

theſe transfers of property, the perfection of the uſe is coeval with the contract, and the conſideration ſpeaks in the new-born intereſt, a motive of obvious and direct influence, ſuch as the viſible inducement of proximity of blood, or of recompence in value, is, as it ſeems, expected by the law as the conſideration to legalize and effectuate the transfer. The law of this country, which has laid its foundations in nature, has carried its reſpect very far for the uſes raiſed upon the affections of blood, to which the covenant has ſupplied the ſolemnity of its teſtimonial. They remained untouched when the cautious ſpirit of our anceſtors, by the ſtatute of inrollments, impoſed a check even upon the uſes which ariſe by contract. Natural affection, founded on conſanguinity, was an oſtenſible motive, while the inducements of moral obligation, have no viſible pledge of their certainty, but reſt in the cognizance of a ſmall number, or in the averment of the party. Thus the lines of diſtinction are eaſily traceable between theſe different conſiderations, and, as before has been remarked, they are all plainly diſtinguiſhable in principle from the valuable

luable conſideration under the ſtatutes of Elizabeth.

It is in this *reſpect* for the conſideration of contracts, that, on this ſubject, the rules of *our* law are remarkably diſtinguiſhed from the civil. The common law of England has always made a difference between the binding force of light and verbal, and of ſerious and deliberate promiſes. The civil law has proceeded upon the ſame diſtinction. The ſame final object of diſcovering the real intention, and the ſame allowance for levity in the promiſe, are characteriſtic of both ſyſtems of juriſprudence, but they try and decide the ſanctity and lubricity of promiſes, by different *criteria*. In the law of Rome, to parties veritably intending to be bound, certain ſtipulatory forms and phraſes were ſupplied (15), which gave judicial ſanctity and obligation to their verbal engagements; while our municipal common law looks only to the conſideration and motive, as the foundation of its judgment, between deliberate and raſh,

(15) Vid. Vinnius, 595. et ſeq. Lexicon Juridicum, tit. Stipulation, 838.

actionable and unactionable promiſes. By the ſolemn and ſettled reciprocation of queſtion and anſwer, by which *verbal* contracts were ratified in the civil law, it was conſidered that the mind gained leiſure for deliberation, and was awakened to exert its natural liberty, ſo that if the ſtipulator adopted the words preſcribed, he was underſtood to manifeſt a ſerious intention to become bound by his promiſe. But, the ſerious intention of the promiſor is held to be manifeſted in our law by the conſideration alone, and the moſt ſolemn aſſeverations will fail as the ground of an *aſſumpſit*, if the conſideration be inſufficient; although, it is to be obſerved, that words are ſo far reſpected in *our* law, as that, if they do not amount in common underſtanding, to a declaration or intimation of ſerious intention, no conſideration will ground a legal promiſe, unleſs there be ſuch receipt of goods, or money, as, in juſtice, requires remuneration and recompence. The reaſoning of the judge in the caſe of *Pillans* v. *Van Mierop* (16), by which it was at-

(16) 3 Burr. 1670.

tempted

tempted to be ſhewn, that, both in the common law of England, and in the law of Rome, promiſes, committed to writing, were binding, without conſideration, ſeems to have paſſed without particular notice by the other judges, who choſe rather to advert excluſively to the commercial exigency of the inſtrument, which was in diſpute, as the foundation of their opinion in favour of its validity. Upon the whole it ſeems, that, without conſideration or writing, by the preciſe obſervance of a ſtated alternacy of verbal queſtion and anſwer, a promiſe was binding in the civil law; and that, where a promiſe in *writing* was availing on *that* account, the circumſtance of its being in *writing*, was only operative as teſtimony, and by way of publication, and not as a neceſſary part of its legal and binding efficacy. *Ad fidem rei geſtæ valent ad obligationem nunquam* (17). But in our Engliſh common law, a conſideration of ſome ſort is always neceſſary to raiſe an *aſſumpſit*, or actionable promiſe. A written promiſe with us imports no higher conſideration, though it furniſhes better means of proof, than a promiſe

(17) Vinnius, 664.

by parol, unleſs in caſes, where ſealing and delivery have made it a deed, or its form and object have inveſted it with the qualities of a negociable inſtrument, by cuſtom or ſtatute. With reſpect, however, to this neceſſity for a conſideration, of ſome ſort, to ſupport a promiſe at law, it may be obſerved, that the intention to be bound, where the act of contracting is proved, ſhall be preſumed, if, by any conſtruction, it may. Indeed the benefit or loſs, which is the conſideration of the promiſe, need never be formally expreſſed in the declaration. If it can be collected by natural inference, it will ſupport the action. But to *ſubvert* a contract, the nullity of conſideration muſt always be *manifeſt* (19).

(19) Vid. 1 Sid. 212, 213, 283. Moore, 412. Raym. 153. Cro. Eliz. 206, 470.

CHAP. II.

SECTION I.

THE ſubject demands ſome enquiry into the nature and extent of the marriage conſideration. As to which, it may be obſerved, that there are two ſorts of conſideration, by which an uſe may be raiſed,—*valuable* and *natural*. The firſt branches itſelf into numerous modifications, ſome of which will be attempted to be explained in this treatiſe. The conſideration of blood, is not the only natural conſideration. Marriage is alſo conſidered as a natural conſideration, to raiſe an uſe at common law, and formerly a common mode of making ſettlements, was, by covenant to ſtand ſeized to uſes. But the marriage conſideration goes further than the conſideration of blood, in raiſing uſes upon a covenant to ſtand ſeized, for a man ſeized of land in fee ſimple, may covenant to ſtand ſeized of it to

the uſe of the woman he intends to marry, or to the uſe of any woman whom his ſon or his kinſman (1) is about to marry, and if the marriage take effect, the uſe will ariſe accordingly (*a*).

(1) Plowd. 307. 2 Roll. Abr. 783.

Delamer's caſe, in Plowden's Commentaries, gives, as a reaſon for the marriage conſideration's being ſufficient to raiſe an uſe, the benefit derived to the ſettler or donor, by the advancement of his child, and his own liberation from the charge of maintenance, but this can only account for it where the proviſion moves from the parent, or perſon in *loco parentis*; yet,

(*a*) The conſideration of marriage had always an efficacy above the mere conſideration of blood, one inſtance of which was its power of grounding an *aſſumpſit*, to which purpoſe the conſideration of blood was a *nudum pactum*, and ſee Cro. Eliz. 755. and ſee the great importance of the marriage conſideration, Plowd. Com. 58.

It is from the great favour borne by the common law to the conſideration of marriage, that the words "*in liberum maritagium*" in the caſe of gifts in frankmarriage, had power to create an eſtate of inheritance againſt the general rule of law, i. e. without livery of ſeizin. Vid. Co. Litt. 21. b.

where

where the intended huſband himſelf makes a ſettlement of his own eſtate, by covenant to ſtand ſeized, the uſe will be raiſed; and the reaſon in Plowden ſtops ſhort of ſuch a caſe. Afterwards, when the marriage conſideration came to be conſidered as *valuable*, the reaſon of its title to be regarded as ſuch, was more ſenſibly inferred from the reciprocal reliance of the parties to the matrimonial contract. There is a caſe in Roll's Reports (2), wherein the efficacy of the marriage conſideration was the ſingle point before the court, and the queſtion, whether it had ſtrength enough to change an uſe previouſly raiſed, was treated as depending on the queſtion, whether it was a valuable, or only a natural conſideration. The caſe was as follows in ſubſtance: J. S. was enfeoffed of land, upon a ſecret truſt that the feoffor ſhould have the land again upon a certain condition's being performed; the feoffee, upon conſideration of natural affection to his daughter, conveyed the land in *marriage* with her; and the queſtion was, whether the huſband of the daughter of the ſecond feoffee, having no notice of the ſecret truſt, ſhould

(2) Sir *George Reynel* v. *Peacock*, 2 Roll. 105.

be chargeable with ſuch truſt or not. And it was inſiſted at the bar, that he ſhould, for marriage was only a natural, and not a valuable conſideration, and was a ſufficient conſideration to raiſe an *aſſumpſit*, or to *raiſe* an uſe, but was too weak to *change* or *deſtroy* an uſe already created and raiſed. It was alſo urged, by way of analogous reaſoning, that, if a feoffee to uſes, enfeoffs a ſtranger upon good (*b*) conſideration, without notice, the former uſe is changed, but if ſuch a feoffee endow his wife *ad oſtium eccleſiæ*, or *ex aſſenſu patris* (*c*), the former uſes remain unaltered. And it was further argued, that if a father ſhould bargain and ſell to his own ſon, *bona fide*, and for valuable conſideration, this would be out of the ſtatute of Marlborough, and the feoffment would not be covinous;

(*b*) By *good* conſideration is intended *valuable*.

(*c*) Theſe eſtates were a kind of jointure at common law, in which the general rules of conveying real property were diſpenſed with in favour of the conſideration of marriage. They were neceſſarily derived out of the lands ſubject to dower, for till the ſtatute 27th H. 8. c. 10. the right of dower could not be barred by the acceptance of a collateral ſatisfaction. Vid. Co. Litt. 36. b.

but

but if land were conveyed by him in conſideration of marriage only, this would be within that ſtatute, and, by conſequence, fraudulent in law. But Bacon, Lord Chancellor, though he aſſented to the propoſition, that the conſideration to deſtroy an uſe, ought to be ſtronger than the conſideration to raiſe an uſe, obſerved, that it would be of miſchievous conſequences, if he, who married in conſideration of the land, ſhould not avoid the truſt, for that he gave up the chance of other preferment, in expectation of the promiſed proviſion, and in this view the conſideration which he gives is *valuable*.

In the caſe above cited, we have ſeen it queſtioned, whether the conſideration of marriage be a valuable conſideration; that point has long ago been ſettled in the affirmative, and at this day ſuch a conſideration clearly makes a conveyance good againſt purchaſers, under the ſtatute 27 Eliz. and gives a title to the benefit of that ſtatute againſt former fraudulent conveyances. There was yet, however, a neceſſary

neceſſary difference, in the inherent qualities, between the valuable conſideration of marriage, which muſt ſtill partake of the conſideration of natural affection, and the valuable conſideration of money, which gives effect to a conveyance by bargain and ſale. And this difference will be beſt explained by recalling the attention of the reader to the characteriſtic properties of the two ſorts of conſideration above-mentioned,—natural and valuable.

It is both reaſon and law, that the natural conſideration of love and affection ſhould be perſonal and excluſive, and that the uſe can be extended to no perſon to whom the conſideration will not alſo extend. Sir Robert Worſeley, ſeized of certain land in fee (*d*), and having iſſue, two ſons,

(*d*) It may be of ſome utility to obſerve, that it is now ſettled, that tenant in tail may convey a baſe fee, by covenant to ſtand ſeized to uſes. For it was a fee-ſimple, conditional at common law, and the ſtat. *de donis* has not altered the eſtate itſelf, but only provided that the iſſue ſhall not be diſinherited by the alienation of his anceſtor. Lord Raym. 779. where the caſe in 1 Saunders, 160. is denied by Holt. C. J. Com. 121. pl. 84. 7 Mod. 18. See the contrary doctrine in 1 Dyer. 8. b. Jenk. Cent. 5. caſe 1. Litt. Sect. 608, 612, 613.

the

the elder a *mulier*, the younger a *baſtard*, covenanted, by indenture, enrolled in chancery, with his eldeſt ſon, and two others, ſtrangers, to convey the ſaid land to the two ſtrangers in fee, before a certain day, to the uſe of himſelf for the term of his life, and after his deceaſe to the uſe of the eldeſt ſon, and of the heirs male of his body; and for default of ſuch iſſue, to the uſe of the ſaid baſtard ſon, (calling him Richard Worſeley, his baſtard ſon) in like entail, &c. And, further, covenanted and granted, that he, and all other perſons who were then ſeized, or might be ſeized, &c. ſhould be and ſtand ſeized to the ſaid uſes and intents, and to no other uſes and intents. And all the juſtices, except Periam, held, that the uſe could not be carried to the baſtard (*e*), without expreſs con-

(*e*) The diſſent of Periam, J. from the opinion of the other judges, was founded on a doubt, whether a baſtard was ſuch a *ſtranger in blood*, as that the uſe could not riſe to him. The ſame caſe is reported in 1 And. 75. without mention of any difference of opinion on the bench. All, however, ſeem to be agreed as to the general rule, that a perfect ſtranger in blood, is incapable of taking an uſe upon a covenant to ſtand ſeized. The rule, however, yields to certain exceptions. It has been ſaid that

conſideration, becauſe the conſideration in law was not good and legal, for he is not of the blood of the father, but in law a

---

that if A. covenants with B. in conſideration of the marriage of his daughter with the ſon of B. to ſtand ſeized to the uſe of C. a ſtranger, for life, and then to the uſe of the ſon and wife in tail, the uſe will riſe to C. although he is a ſtranger, for the ſake of the remainder, which could not take effect as a remainder without the previous particular eſtate to conſtitute it ſuch. Shep. T. 488. and vid. *Machell* v. *Clark*, Lord Raym. 779. Crompt. J. C. 63. a. But where there are intermediate uſes to ſtrangers, by way of remainder, as the caſe put in Plowd. 307. it ſeems the better doctrine to conſider them as void *a principio*, for they are not wanted to give effect to the ulterior uſe as a *remainder*, which in ſuch caſe may be accelerated in intereſt; and, on this principle, the caſe in Plowden was called by Moore in 4 Leon. 137. a conceit, and ſaid by him to be ruled not law in *Lord Paget's* caſe. The uſe reſulting to the covenantor in *Pybus* v. *Mitford*, 2 Lev. 75. turned upon the doctrine ſo copiouſly treated by Mr. Fearne, Cont. Rem. 43. et ſeq. which doctrine ſeemed in *Pybus* v. *Mitford* to be thought eſſential to the validity of the limitation to the heirs male of the body of the covenantor. Sed vid. *Wills* v. *Palmer*, 5 Burr. 2615. Where a contingent remainder is limited after an uſe to a ſtranger, upon a covenant to ſtand ſeized, the neceſſity of ſuch ſaving conſtruction for the ſake of the remainder, as is above-mentioned, will readily occur to the reader.

mere

mere ſtranger (*f*). That the effect of the valuable conſideration in a bargain and ſale, is not ſo reſtricted in its operation, appears from the 2d of the Inſtitutes, where the following caſe is put by Lord Coke: "If A. by deed indented and inrolled, in conſideration of one hundred pounds paid by B. bargains and ſells land to B. C. and D. the land paſſes to all; for although the valuable conſideration be expreſſed to be paid only by one, yet, it muſt be intended, that it was paid by all, that the land may paſs to all."

But the marriage conſideration, which may be regarded as partly natural, and partly valuable, has not attained to this

(*f*) Dyer, 374. *Gerrard* qu. t. againſt *Worſeley*; and ſee the caſe of *Goodtitle* v. *Petto*, Strange, 934. where a general power of appointment, by this mode of conveyance, limited by a man to his wife, after giving her an uſe for life, was adjudged void, notwithſtanding he might well have given her an eſtate, in fee ſimple, which would have neceſſarily included a power of free diſpoſition.

extent

extent of operation. If the ſettlement is made by covenant to ſtand ſeized, the uſe will be carried by the pure force of the natural conſideration of marriage, to all the objects of the matrimonial union, and by force of the conſideration of blood (which need not, in ſuch caſe, be expreſſed) to all the collateral relations of the ſettler; but the valuable conſideration ſtops ſhort of this extent; and, though the uſes will riſe in ſuch a caſe, in favour of theſe remote kindred, or in favour of ſtrangers, if the ſettlement be grounded on a conveyance, operating by tranſmutation of poſſeſſion, yet the meritorious efficacy of the valuable conſideration of marriage, will bound itſelf to the perſons included within the view of the ſettlement (3). This limited extent of the valuable conſideration of marriage, which is, nevertheleſs, of the higheſt eſtimation in law, is a conſequence of the plain object of the inſtitution,—the foundation of a new family. In the paſſage above cited from the 2d Inſtitute, we obſerve, that to carry the effect of a bargain

(3) Roll. Abr. 784. pl. 5. Moore, 504.

gain and ſale to C. and D. they muſt each be *ſuppoſed* to have contributed to the conſideration; but ſuch a ſuppoſition, in the caſe of marriage, would import a contradiction to the nature and purpoſes of the inſtitution.

SECTION II.

AFTER the paſſing of the ſtatutes of Elizabeth, againſt fraudulent conveyances, when queſtions began to ariſe with reſpect to their operation on marriage ſettlements, it became neceſſary more accurately to enquire in every caſe, how far the valuable conſideration extended; and one of the firſt points expedient to be ſettled was, whether, where a ſettlement was made before, and in conſideration of marriage, there being evidence of a good primary inducement, the ſecondary and remote limitations could be regarded as parts of an entire tranſaction, and as ſaved by the efficacy of the original motive, from the operation of the above-mentioned ſtatutes. It was admitted in the caſe of *Bellingham* v. *Lowther*, reported in 1 Ch. Caſ. 243. and cited by Talbot, in *Oſgood* v. *Strode* (1), as a point ſettled by *Sir John Jacob*'s caſe, that a deed might be fraudulent as to one, and good as to another.

(1) 2 P. Wms. 248.

Indeed

Indeed, in the caſe already cited from Lane (2), the ſame doctrine had many years before been implicitly maintained in the court of Exchequer. It has received confirmation (3) from ſuch a variety of ſubſequent caſes, that it ought not to be lightly diſputed. It is true, that it appears from what fell from Lord Hardwicke in *Goring* v. *Naſh* (4), that courts of equity will not decree a *partial* performance of articles, and that they have ſometimes decreed the performance of articles in favour of *volunteers*, on the ground that *part* of the articles ought clearly to be performed, and becauſe they will not ſplit agreements (*a*); but the obſervation was intended to be applied only to caſes where no creditors or purchaſers for valuable conſideration appeared, and where the perſons calling for the execution of the articles were purchaſers in the firſt or ſecond degree; and, even as to caſes ſo circumſtanced, it was at the ſame time obſerved by his Lordſhip, that, where *ſome* of the objects ap-

(2) Lane, 22.

(3) Style 428. and ſee 2 Lev. 105. *White* v. *Stringer*, 1 Vern. 285. *Jaſon* v. *Jervis*; and ſee this point admitted Hard. 397. by the counſel for the defendant in *Jenkins* v. *Kemyſhe*. See alſo *Martin* v. *Seamore*, 1 Ch. Ca. 170.

(4) 3 Atk. 190.

(*a*) The ſame rule was acquieſced in by Lord Hardwicke, in 1 Vez. 453.

peared clearly improper to be enforced, a bill for a ſpecific performance has been diſmiſſed *in toto*; ſo that his Lordſhip's obſervation, which, as to this point, is only explanatory of the uſage of the courts of equity in granting their aſſiſtance in certain caſes, does not wholly reject the principle above ſtated from caſes in *thoſe courts* between purchaſers in the ſecond degree, as wives and children, and the legal repreſentatives of ſettlers; for, though the aid of the court is not to be refuſed or granted by piecemeal, yet, if the queſtion, whether relief or not turns upon the preponderancy of the meritorious or the merely voluntary parts of a deed, the inequality of the limitations in the ſame inſtrument, in point of ſubſtantive validity, is fully admitted. And, although the abovementioned obſervation of Lord Hardwicke, may ſeem to go the length of affirming, that, where the primary motives of the ſettler are among the conſiderations of the ſecond rank in courts of equity, ſubſequent limitations and proviſions, contained in the ſame deed, though not within the ſcope of the original conſideration,

ſideration, are not to be impeached, unleſs by purchaſers for valuable conſideration, but ſhall be protected by the goodneſs of the original intention; yet, an attentive examiner of the grounds of judicial determinations will remark the anxiety even of courts of equity, in caſes diſputed between perſons claiming under articles and legal repreſentatives, to ſeek a juſtification for the ſupport given to ſuch collateral limitations and proviſions in ſome ſlight acceſſorial or derivative admixture of valuable conſideration.

SECTION III.

THIS enquiry will often lead to the conſideration of caſes reſolved in the court of chancery, wherein neither creditors or purchaſers have been concerned, but the conteſt has been maintained by perſons claiming under articles and covenants, againſt legal repreſentatives. The diſtinction between voluntary and valuable claims, formed a natural object of that court's juriſdiction, before it became a queſtion for a court of law; for, until the paſſing of the ſtatutes under diſcuſſion, voluntary conveyances and covenants could not be impeached in common law courts; to which it was not competent to infer fraud from the want of conſideration in a conveyance, though followed by a ſale for value. But as the juriſdiction of a court of equity, by its power of binding the conſcience, was the proper reſort for compelling the ſpecific performance of contracts,

contracts, for inforcing the diſcharge of truſts, and for ſupplying defective executions of powers, and the want of ſurrenders of copyhold eſtates, the balance of pretenſions in the ſcale of conſideration, has always been a principal part of equitable cognizance.

Covenants and conveyances, merely voluntary, have always, in courts of equity, been regarded in an unfavourable light; and in diſputes between heirs at law, and perſons praying the ſpecific performance of articles, under which they are *remotely* entitled, the queſtion is ſometimes argued with as ſcrupulous a requiſition of the marks of valuable conſideration, as, where a purchaſer is diſputing in a court of law, the validity of a prior conveyance, under the ſtatute 27 Eliz. If the equity of parties are equal, a court of equity has no foundation to act upon: where, in ſuch a caſe, the legal title is found, there it is ſuffered to remain: for the rule is, that law and equity together, ſhall prevail againſt equity alone, if the equity that goes with the law is as ſtrong as the

oppoſing equity. So that in a court of equity, an heir cannot diſturb a voluntary alienee, neither can a ſtranger who has nothing but a mere voluntary *covenant* to rely on, prevail againſt an heir at law (1). But this equilibrium may be eaſily diſturbed. In many caſes, valuable conſideration is not neceſſary to conſtitute a purchaſer in the underſtanding of a court of equity. The natural obligations of parents and huſbands is looked upon as making wives and children purchaſers, where creditors, or purchaſers for valuable conſideration, are not concerned (2), and younger children are ſometimes ſaid to be in the nature of creditors. Where the conteſt has been only with the legal repreſentative, articles have been decreed in favour of collaterals, to whom the marriage conſideration could not extend (3). And where, in ſuch a caſe, the application has been made by a perſon directly claiming under the conſideration of the marriage articles, the court has extended the benefit of its decree to remote objects, rather than garble and ſplit agreements (4). The court

(1) 1 Vez. 412.

(2) 3 Atk. 191. and ſee *Uvedale* v. *Halfpenny*, 2 P. Wms. 152.

(3) 3 Atk. 188. *Vernon* v. *Vernon*, 2 P. Wms. 594.

(4) 3 Atk. 490.

court of chancery grants its relief with more reſerve, where it is called upon to ſupply ſurrenders of copyholds, or to help defective executions of powers; and will lend itſelf only to creditors, wives or children, in ſuch caſes, and not to *them*, if the heir at law, being a child, will thereby be left unprovided for (5). But where there is marriage, or other valuable conſideration, courts of equity will always ſupply the defective execution of a power, as well as compel the ſpecific performance of articles. And, generally, whatever it is in the power of the perſon covenanting to do, provided the covenant be for valuable conſideration, equity will look upon as done, and will ſupply the want of circumſtances, not only againſt an heir, who claims *under* the covenantor, but againſt the remainderman, who does not *ſo* claim (6).

(5) Coxe's edit. of P. Wms. 1 vol. 60. note.

(6) *Cotton* v. *Layer*, 2 P. Wms. 623.

In caſes where *remote* objects of marriage articles have applied to the court for the execution of ſo much of the articles as relate to them, the court has looked narrowly for ſome tincture of valuable conſideration. And where no ſhade of value

has been diſcoverable, theſe diſtant claims have been diſregarded, and treated as too inſignificant to be admitted to diſturb the legal title of the real or perſonal repreſentative. The caſes of *Vernon* v. *Vernon* (7), *Stephens* v. *Trueman* (8), and *Goring* v. *Naſh* (9), are inſtances of the ſpecific execution of articles, in favour of *near* kindred, not within the marriage conſideration, for whoſe ſake the court will interfere upon very ſlight grounds, as was obſerved by Lord Hardwicke, in the above mentioned caſe of *Stephen* v. *Trueman*; and, indeed, in all the three caſes laſt referred to, the mere right in the truſtees, to bring an action at law, was conſidered by the court, where the claim was by parties ſo *nearly* related to the ſettler as a foundation for the decree, notwithſtanding it was urged that voluntary covenants are not reſpected in courts of law, where they never obtain more than nominal damages.

(7) 2 P. Wms. 594.
(8) 1 Vez. 73.
(9) 3 Atk. 188.

In the caſe of *Oſgood* v. *Strode* (10), the bill praying to have the marriage articles carried into execution, was brought by the

(10) 2 P. Wms. 245.

grandſon of the ſettler, claiming under a limitation both remote, and collateral to the conſideration of marriage: there the court looked anxiouſly about for a ground to conſider him as a purchaſer: and this is a caſe wherein much refinement of reaſoning is introduced on the ſubject of *conſideration*. Many other caſes of this deſcription, determined in the court of chancery, though involving no queſtion upon the ſtatutes of Elizabeth againſt fraudulent gifts and conveyances, materially conduce to illuſtrate the points of view in which caſes may be regarded as extending the ſhelter of the valuable conſideration beyond the primary objects of a marriage ſettlement. In deciding caſes upon theſe ſtatutes, courts of equity hold themſelves bound by a ſtricter meaſure, as was obſerved by Lord Hardwicke in *Goring* v. *Naſh*, than in family caſes, where the queſtion always is, whether a ſuperiour or inferiour equity ariſes on the part of the perſon who comes for a ſpecific performance (11). But this ſtricter meaſure is not *ſo* ſtrict, according to ſome opinions, as that the court of chancery will

(11) 3 Atk. 388 1 P. Wms. 227.

will ſet aſide a voluntary conveyance, merely for being voluntary, unleſs it can diſcover in it actual fraud. The diſtinction, laid down by Lord Hardwicke, in *Bennet* v. *Muſgrove* (12), was as follows: "Where a ſubſequent purchaſer, for valuable conſideration, would recover the eſtate, and ſet aſide, or get the better of, a precedent voluntary conveyance, if the conveyance was fairly made, and without actual fraud, the court will ſay, take your remedy at law; but wherever the conveyance is attended with actual fraud, though they *might* go to law, by ejectment, and recover the poſſeſſion, they may come into this court to ſet aſide the conveyance." But it is to be remembered, that his Lordſhip introduced this diſtinction with the remark, that courts of law are *obliged* to conſtrue all voluntary conveyances fraudulent. And it is alſo worthy of remembrance, that his Lordſhip in *Ruſſel* v. *Hammond* (13), declared, that he would not lay down any other rule in equity than what is followed at law upon theſe ſtatutes of Elizabeth.

(12) 2 Vez. 57.

(13) 1 Atk. 35.

SECTION IV.

THE words of Lord Hale in *Jenkins* v. *Kemyſhe* as the caſe is reported in Hardreſs (1) are as follow: "The conſideration of marriage, and of the marriage portion, will run to all the eſtates raiſed by the ſettlement, although the marriage is not concerned in them, ſo as to make them good againſt purchaſers, and to avoid a voluntary conveyance;" which words were cited and much relied upon by the counſel for the plaintiff in *Oſgood* v. *Strode:* but Lord Chancellor Macclesfield ſeemed to conſider that theory as too refined, for it was obſerved by him in the ſame caſe, that "the marriage and marriage portion ſupport only the limitations to the huſband and wife, and their iſſue; and that this was all that could be preſumed to be ſtipulated for by the wife and her friends." His Lordſhip further obſerved, that, as to the caſe of *Jenkins* v. *Kemyſhe*, where there was a limitation to the

(1) Hard. 398.

the heirs of the body of the huſband by any other wife, that limitation, though not made for a valuable conſideration, was, however, not fraudulent, for that there was a fair and honeſt occaſion for the making of ſuch ſettlement, *i. e.* the marriage." This defence, on the ground of fair and honeſt intention in making the ſettlement, ſeems to be an illogical anticipation of the queſtion on theſe ſtatutes of Elizabeth,—an aſſumption of *that*, which, it is apprehended, is the very thing in diſpute. This probably appeared to Lord Hale (it is not irreverent to conjecture the reaſons by which the minds of great men have been influenced, when great men diſagree with each other) as too looſe a criterion, or he would have adopted it in preference to an abſtruſe unſubſtantial notion, which the underſtanding cannot ſteadily embrace. Perhaps his regard to the rigorous ſenſe which ſome might at that time attribute to the word *voluntary*, as applicable to every limitation or proviſion, which was not purchaſed by the marriage conſideration or portion, induced him to ſtretch, by artificial reaſoning, the conſideration of marriage

marriage beyond its natural and obvious extenſion, and to overlook thoſe characters of purchaſe and contract, which in a more enlarged interpretation of the word *purchaſe*, and a narrower and more rational comprehenſion given to the word *voluntary*, will often caſt an impreſſion of value on thoſe collateral limitations which lie out of the compaſs of the matrimonial conſideration.

There appears to be a ſenſible ground for the obſervation of Lord Macclesfield before mentioned, "that the marriage and marriage portion ſupport only the limitation to the huſband and wife and their iſſue; and that this is all that can be preſumed to have been ſtipulated for by the wife or her friends." If there be no party to a ſettlement, but the huſband and wife, and the friends of the wife, no limitation in ſuch ſettlement of the huſband's eſtate in favour of collateral relations of the huſband, can be conſidered as fortified by the conſideration of marriage as againſt creditors and ſubſequent purchaſers. In the caſe of *Vernon* v. *Vernon* (2), the eſtate

(2) 2 P. Wms. 594.

eſtate moved wholly from Thomas Vernon the huſband, who, in his marriage articles, covenanted to lay out a certain ſum in the purchaſe of lands, and to ſettle the ſame on himſelf and his wife for their lives, remainder to their firſt and every other ſon in tail male, remainder to the heirs male of Thomas Vernon, remainder to George Vernon, one of the brothers of the huſband, for life, remainder to his firſt and every other ſon in tail male, remainder to Sir Charles Vernon, another brother, for life, remainder to his firſt and every other ſon in tail male, remainder to Thomas Vernon the huſband in fee: to which articles Sir Thomas Vernon the father was a party, but neither *gave* nor covenanted to *pay* or *ſettle* any thing upon the marriage. After the deceaſe of Thomas Vernon without iſſue, the brothers brought their bill againſt the widow, who was a deviſee of the whole of this eſtate by the will of her huſband made ſubſequently to the articles, for the ſpecific performance of the articles; and performance was decreed; though the Chancellor was clearly of opinion that ſuch an agreement ought

ought not to be performed againſt a creditor (*a*).

It ſeems indeed a clear propoſition that where there are no parties to a ſettlement, beſide the huſband and the wife and her friends, the conſideration of marriage and the marriage portion can look only to the eſtabliſhment of the new family. When we would bring in a perſon as a valuable purchaſer,

(*a*) In *Vernon* v. *Vernon* the Court adopted, as the ground of its reſolution, the right of action at law in the truſtees, upon the covenants with them in the marriage articles. The influence of which covenants upon the relief in courts of Equity, may be collected from the above-mentioned caſe, and from *Goring* v. *Naſh*, or *Fagg* v. *Naſh*, 3 Atk. 188. and *Williamſon* v. *Codrington*, 1 Vez. 511. The judgment in *Goring* v. *Naſh* was grounded upon the authority of *Vernon* v. *Vernon*; the reſult of which two caſes is, that where the diſpute is between a near collateral relation claiming under marriage articles, and the repreſentatives of the ſettler, the Court will not throw the party upon his remedy at law, but will decree *ſpecific* relief, and *that*, notwithſtanding a precedent limitation to the huſband or ſettler, had the articles been carried into execution in his lifetime, would have made him tenant in tail, and *ſo* competent to bar the limitations over. But in *Williamſon* v. *Codrington*, where the ſettlement was

purchaſer, we muſt find at leaſt ſome ſhew of a contract or ſtipulation whereon to ground the inference; but in the caſe laſt ſuppoſed, there is no perſon to ſtipulate or contract in behalf of the huſband's relation. The huſband cannot contract with himſelf, nor, without almoſt equal violence to ſenſe, can we ſuppoſe him to *contract* for the diſpoſal of *that* which is his *own*; ſtill leſs plauſible would be the ſuppoſition that the wife or her friends had bargained for a benefit to a collateral

---

was avoided by the ſale to a purchaſer for value, it was clear, that no ſpecific relief could be granted. It was moreover, held, that no ſatisfaction in Equity can be demanded againſt the covenantor, or againſt his eſtate after his deceaſe, unleſs it be ſuch a covenant as that a ſuit at law may be maintained upon it. And in the laſt-mentioned caſe the Court made the meaſure of the retribution correſpond with the ſpirit and intent of the tranſaction, and not with the letter of the covenant. In 1 Vez. 446. Lord H. obſerved, that there is a good ground for relief in ſpecie, when damages at law would be an inadequate and ineffectual remedy. But Equity will often give relief, by compelling ſpecific performance of agreements, where no remedy can be had at Law; as in the caſe of infants and feme coverts, where the conſideration is marriage, or where proper ſettlements are made after marriage. 2 P. Wms. 242.

relation

relation of the huſband. The caſe of *Vernon* v. *Vernon* is a remarkable inſtance of the doctrine—that Courts of Equity will decree execution in favour of collateral limitations to *near* kindred in marriage articles, as againſt the repreſentatives of the ſettler; and though the counſel for the plaintiff in that caſe took pains to identify it in principle with the reſolution in *Oſgood* v. *Strode*, yet it was impoſſible to deny the ſtrong diſtinction ariſing from the queſtionable intereſt of the father, who joined in the ſettlement in the laſt-mentioned caſe. In *Oſgood* v. *Strode*, the remoteneſs of the collateral limitation ſeemed to create a neceſſity of finding ſomebody who might be conſidered in the light of a purchaſer for the plaintiff, to turn the balance of equity in his favour againſt the real repreſentative. Caſes of this ſort, it is true, are not direct authorities on queſtions which ariſe on the ſtatutes of fraudulent conveyances; but as the Court of Chancery has adopted very narrow diſcriminations in determining conteſts between collateral claimants under marriage articles and heirs at law, or other legal repreſentatives, and has ſought with appa-

rent ſolicitude to juſtify its ſupport of agreements by ſome traces of valuable conſideration, the ſtudent will find aſſiſtance in his progreſs through the various determinations on the ſtatutes of fraudulent conveyances by an attention to the grounds of theſe *equitable* judgments.

Although in the caſe, laſt ſuppoſed, of a ſettlement to which the intended huſband and wife, and the friends of the wife, are the only parties, and where a collateral proviſion for a relation of the huſband ariſes wholly out of the huſband's eſtate, it is difficult to find a pretence of valuable conſideration; yet, if a brother, or other relation of the huſband, be made to take a benefit out of the property of the wife by a limitation over, after the iſſue of the marriage, ſuch a limitation may be well enough ſuppoſed to have grown out of the marriage contract; for the huſband has in ſuch a caſe ſomebody to contract with, and there is a proper ſubject of ſtipulation and purchaſe. He is not bargaining for the privilege of diſpoſing of his own, but contracting for an intereſt which is in the diſpoſition of another.

another. In the caſe of *Edwards* v. *the Counteſs of Warwick* (3), it was agreed by the marriage articles, that 10,000 *l.* out of the wife's portion ſhould be laid out in the purchaſe of lands to be ſettled to the ſame uſes as the manor of K., the huſband's eſtate, was to be ſettled, i. e. to the huſband for life, then to the iſſue of the marriage in the uſual form, and in default of iſſue to the heirs of the huſband. The huſband died, leaving his widow and one ſon, who, after levying a fine of the manor of K. to the uſe of himſelf in fee, died without iſſue and inteſtate, and a bill was filed by the heir at law of the ſon to have the mortgage, whereon the 10,000 *l.* had been laid out aſſigned to her. This was oppoſed by the widow as adminiſtratrix of her ſon, who contended that this 10,000 *l.* there being no iſſue of the marriage remaining, and ſo no perſon to claim within the view of the ſettlement, ought to be left, and treated as money, and be divided between herſelf and the half ſiſter of the deceaſed ſon, according to the ſtatute of diſtribution.

(3) 1 P. Wms. 170.

This caſe was principally decided in favour of the heir againſt the perſonal repreſentatives upon the well-known equitable doctrine, that money, agreed to be laid out in the purchaſe of land, is to be conſidered as land, which again reſts upon the more elementary doctrine of the courts of Equity, that what is agreed to be done muſt be conſidered as already done; and conſequently, the limitations in this caſe would attach upon the perſonalty as if it were land, unleſs the ſon, who had the dominion over it, had elected, by ſome deciſive act, to treat it as money, which had not been done (4). Yet, ſince in the ſame caſe much ſtreſs was laid upon the limitation's being voluntary with reſpect to the heir, the Court anſwered that argument by adverting to the room which the tranſaction afforded for rationally ſuppoſing the huſband to have ſtipulated for a benefit to himſelf out of the wife's portion. In this caſe, as in *Oſgood* v. *Strode*, a very *remote* intereſt under the marriage articles was relied on by the perſon applying for a ſpecific performance, and, therefore,

(4) See the caſe of *Fulham* v. *Jones*, 7 Vin. laſt Ed. tit. Debtor and Creditor, 44.

fore, the Court ſought for a probable ground for inferring a ſpecies of contract and valuable conſideration. In *Vernon* v. *Vernon*, where the party applying was a brother, a ſtill ſlighter ground, ſuch as the right of action in the truſtees, was admitted to ſupport the decree for the execution of the articles.

There was, indeed, in the caſe of *Vernon* v. *Vernon*, a ſort of compaſſionate equity (*b*), on which the Chancellor laid conſiderable ſtreſs, and which may be looked upon by ſome as diſtinguiſhing it in principle from *Bellingham* v. *Lowther* (5), the circumſtances of which are

(5) 1 Ch. Ca. 243.

(*b*) According to the articles, an eſtate tail to the ſettler, was to precede the limitation to the brothers of the ſettler, ſo that their remainders were not only voluntary, but precarious, and in the power of Thomas Vernon the ſettler; and the ſame circumſtance was inſiſted upon for the plaintiff in *Bellingham* v. *Lowther*. But in *Vernon* v. *Vernon*, by the will of a deceaſed elder brother, a perſonal eſtate had been bequeathed to the plaintiffs, which bequeſt was void as being too remote, and the preſent ſettler having had the advantage of the invalidity of that diſpoſition, ſeemed to be bound in conſcience to make ſome ſatisfaction to his brothers. And this circumſtance ſeemed to weigh much with the Chancellor.

briefly as follow: Sir H. Billingham, on his marriage with Catherine Lowther, covenanted to ſettle certain freehold lands to the uſe of himſelf and Catherine, his intended wife, for their lives, remainder to the heirs male of his body by her, remainder to the heirs male of his own body, remainder to his brother Allen Bellingham in tail, remainder to the heirs of Sir Henry, and covenanted to ſettle certain copyhold lands to the ſame uſes. Sir H. Bellingham was travelling in order to make a ſurrender of his copyhold lands purſuant to his covenant, but fell ſick by the way. He gave, however, a letter of attorney to other perſons to make this ſurrender, but dying before it was done, the copyhold deſcended to his daughter as heir general; and his brother Allen Bellingham, who was the remainder man in the articles, brought his bill to have the covenant executed by the heir at law, by conveying the copyhold to him in tail *prout* the articles. It was contended that the covenant was voluntary as to Allen Bellingham, the brother, he being no party to the articles, nor within the conſideration

tion of the marriage or the marriage portion, and that the articles might be fraudulent as to the brother, though good as to the wife and iſſue of the marriage, and a voluntary conveyance to a younger brother ought not, if defective in law, to be made good in equity againſt an heir; for which reaſon the Lord Keeper diſmiſſed the bill, and would not compel the execution of ſuch voluntary articles.

It may be obſerved, too, that the heirs general, who probably were the children of the ſettler's daughters, would have gone without any inheritance, if the younger brother, who had already the whole freehold property, had been ſuffered to carry away the copyhold too.

The reader will perceive, that there is nothing in theſe obſervations inconſiſtent with the reſult of the authorities, which Mr. Coxe, in his note to the caſe of *Watts* v. *Bullas* (6), has collected, to ſhew the extent to which the court carries its relief in caſes of omiſſion to ſurrender copyholds, and of defective executions of powers, and

(6) 1 P. Wms. 60.

which, according to thoſe authorities, bounds itſelf to the claims of creditors, wives, and children. The preſent ſubject is confined wholly to marriage articles containing digreſſive limitations to collateral relations of the parties to the matrimonial contract; and where the goodneſs of the primary motive, coupled with the averſion of the court to a partial and imperfect execution of articles, puts theſe collateral limitations in a more favoured ſituation than claimants under ſimple voluntary agreements, which do not turn upon ſuch cardinal motive, as primarily influences the parties to a matrimonial contract. But though it ſeems that the court is averſe to the partial execution of articles, yet, whether it will compel performance *at all* or not, depends upon the ſtrength of the claim of the party applying; and that queſtion muſt attract the whole ſtreſs of the enquiry reſpecting thoſe degrees of conſideration and inducement, which decide the preponderance of equity.

In caſes of actual ſettlements, (which can only be diſputed by creditors or purchaſers,) courts

courts of law have not proceeded on ſuch notion of entirety in the conſtruction of the inſtrument under theſe ſtatutes of fraudulent conveyances, as by ſome ſeems to have been ſuppoſed, and to which ſuppoſition the doctrine of Lord Hale, before-mentioned, appears to have lent ſome countenance. But the terms of that doctrine are but faintly intelligible; and it ſeems that Lord Macclesfield, whoſe judgment was extremely ſolid, was diſſatisfied with its principle. It appears very clear, that the reaſons on which the court of *chancery* grounds its refuſal to execute articles partially, or, in the language of Lord Hardwicke, to garble and ſplit agreements, ought not to govern the proceedings of a court of *law* upon theſe ſtatutes. It was admitted, indeed, by Lord Hardwicke himſelf, in the caſe of *Goring* v. *Naſh*, that this practice of the court of chancery, in reſpect to articles and agreements, does not extend to the caſe wherein the intereſts of creditors or purchaſers may be affected. In *Bellingham* v. *Lowther*, the conſtruction, by courts of law, of legal executed ſettlements, as fraudulent as to one,

and

and good as to another, under theſe ſtatutes, for which Sir *John Jacob*'s caſe was cited, was ſuggeſted as furniſhing a rule applicable to the caſe of ſpecific performances in equity. But the inſtances are not analogous: the rule of not garbling agreements in equity, *admits* the partial validity of executed ſettlements at law, and of articles in equity, where creditors or purchaſers are concerned: but in equity, whether the court will execute or not, where creditors and purchaſers are not concerned, depends upon the merits of the perſon applying; but it will *wholly* execute, or *wholly* reject. In *Bellingham* v. *Lowther*, the court refuſed relief; but it was ſaid by the court, that if the wife, who was a purchaſer under the articles, had applied, they muſt have been ſpecifically carried into execution, and, as it ſeemed, they muſt have been integrally executed for the benefit of all *collateral* objects, as well as for the wife and the iſſue of the marriage.

SECTION V.

IN ſuppoſing a caſe, wherein the intended huſband and wife, and the wife's friends, are the only parties to the ſettlement, a narrow foundation has been taken, and one whereon it is difficult to frame a conſideration for the ſupport of limitations, beyond the marrying perſons and their iſſue; but the caſe is greatly widened where the parents of the huſband, having ſomething to part with, and conſequently ſome ſubject of ſtipulation and contract peculiar to themſelves, are parties to the ſettlement.

On this head, however, it ſhould be obſerved, that the caſe is always *more* widened, and affords greater ſcope for the ſuppoſition of contract, where the parent parts with only a partial intereſt, as by joining with the ſon in barring an entail, or by ſome other contributary or auxiliary

(1) Lane, 22.

It is laid down in Lane's Reports (1), in the caſe of *St. Saviour, in Southwark*, (which is important, as being one of the earlieſt extant on the ſtatutes of fraudulent conveyances) as a reſolution of the judges, that if a man, upon the marriage of his ſon, with the daughter of B. covenants to ſtand ſeized of land to the uſe of his ſon, for his life, and then to the uſe of other his ſons in remainder; ſuch limitations to the other ſons are voluntary (*a*), as againſt a purchaſer: for which deciſion no reaſon is given; but it readily occurs, that, if, as the ſtatement of the caſe ſeems to import, the whole eſtate is to be underſtood to have moved from the father, there was nobody to whom the character of purchaſer for the brothers could apply; and, perhaps, even had the father only *joined* with the marrying ſon, in barring an *entail*, ſo as, according to the foregoing rule, to let in the ſuppoſition of his purchaſing the limitation to

(*a*) Here too the word "*voluntary*" ſeems to be uſed, as to the ſtatute 27 Eliz., as having the ſame meaning with *fraudulent*.

the

the younger brothers, out of the inheritance of the eldeſt ſon, yet the colluſive and colourable complexion of the ſettlement, which compriſed limitations to collateral objects, preceded by no proviſion for the iſſue of the marriage, would, notwithſtanding ſuch circumſtances of conſideration to ſupport theſe collateral limitations, have endangered the tranſaction as againſt creditors or purchaſers.

In the caſe of *Staplehill* v. *Bully* (2), determined near a century afterwards, the neceſſity of ſome farther conſideration, than that of the marriage and marriage portion, to ſupport theſe collateral limitations in marriage ſettlements, was felt by the court of chancery. In that caſe, where the whole eſtate ſeemed to come from the father of the huſband, the limitation to the ſecond ſon in tail, after an eſtate tail limited to the eldeſt ſon on his marriage, was conſidered as voluntary, becauſe the conſideration of the marriage did not extend to it.

(2) Prec. in Chan. 223.

It

It ſhould be obſerved, however, that though it was expreſsly held in this laſt-mentioned caſe, that ſuch collateral limitation was voluntary, yet there was here another circumſtance which had great weight with the court; for, although, in *Vernon* v. *Vernon*, and *Goring* v. *Naſh* (3), no ſtreſs was laid on the antecedent eſtate tail (*b*), in

(3) 1 Vez. 513.

(*b*) The reader will find the doctrine, as to this point, enlarged upon in the caſe of *Ramſden* v. *Hylton*, 2 Vez. 309. where the caſes of *Goring*, or *Fagg* v. *Naſh*, and *Vernon* v. *Vernon*, were relied upon by the Chancellor. In *Ramſden* v. *Hylton*, the diſpute was between the general creditors, and the daughters claiming their portions under articles ſubſequent to marriage, which portions where provided for by a limitation to truſtees, coming after eſtates tail to the ſons, which had remained unbarred. The relief being againſt creditors in this caſe of *Ramſden* v. *Hylton*, it would have been a very remarkable caſe, but that, on the other hand, there appeared to have been an agreement before the marriage, with which the ſubſequent articles might be coupled. And if a conſideration could be found for the articles, the daughters, in that caſe, were plainly within the extent of that conſideration. In *Goring* v. *Naſh*, and *Vernon* v. *Vernon*, there was no pretence of valuable conſideration: ſo that, on the whole, theſe caſes are pretty equally balanced, as to this point, in the weight of their inferences.

the

the huſband, yet, as in this caſe of *Staple-hill* v. *Bully*, the leaſe, againſt which relief was ſought, came out of the precedent eſtate tail, and as it was ſaid, that any conveyance by tenant in tail, in *Equity* was good, both circumſtances appear to have had weight in producing the decree.

In the caſe of *Roe*, on the demiſe of *Hamerton* againſt *Mitton* (4), the opinion of the court of C. P. ſtrongly featured with the maſculine ſenſe of the judge who pronounced it, while it deſcribed the efficacy, diſcloſed the neceſſity of ſome ſuperadded intereſt, to operate by way of price or purchaſe for theſe collateral limitations in a ſettlement, when they are diſputed by creditors or ſubſequent purchaſers. The caſe was thus, as ſtated by the Lord Chief Juſtice. John Hamerton, in 1706, being ſeized in fee of the lands in queſtion, and at the ſame time having a mother living, who had an annuity of 50 *l.* iſſuing out of the *whole* lands, and having two brothers, Thomas and Vavaſor, entered into a treaty of marriage with Mary Kelly: the mother of John, previous to the marriage, agreed to part with her ſecurity upon the

(4) 2 Wilſ. 356.

whole lands for her annuity, and to take, inſtead thereof, a ſecurity for the ſame upon *part* of the lands. Accordingly, ſhe and her ſon John, (the intended huſband) joined in a fine, to deliver the whole lands from the ſaid annuity; and in conſideration of the marriage, and a portion of 1200 *l.* and of the ſaid releaſe of the ſaid annuity, John Hamerton conveyed to truſtees, upon truſt to pay 50 *l.* a year to the mother, out of part of the lands, for her life, then, as to the whole of the lands, to the uſe of John Hamerton, for his life, remainder to truſtees to ſupport contingent remainders, remainder to the firſt and every other ſon in tail, male, remainders to Thomas Hamerton, and Vavaſor Hamerton, ſeverally, one after the other in tail male; remainder to the daughter and daughters of the marriage of John Hamerton and Mary Kelly; remainder to John Hamerton in fee. There was no iſſue of the marriage. Afterwards, John Hamerton mortgaged the eſtate to Monkton, and acknowledged a fine to him *ſur conceſſit*: then Monkton purchaſed of John Hamerton, for a valuable con-

conſideration in fee, and took a fine from him *ſur conuſance de droit come ceo.* Afterward, John Hamerton died without iſſue, but Thomas Hamerton, his brother, left a ſon, Vavaſor Hamerton, the leſſor of the plaintiff.

Lord C. J. ſaid, that the ſingle queſtion was, whether there was a good and *valuable* conſideration to ſupport the limitation in the ſettlement to Thomas Hamerton, the late father of the leſſor of the plaintiff, or whether that limitation was merely voluntary under the ſtatute 27 Eliz. and bad againſt a purchaſer for a valuable conſideration. Upon which queſtion he was clearly of opinion, that the ſettlement was fair and honourable, and that there was a good and *valuable* conſideration to ſupport the limitation therein to Thomas Hamerton, the late father of the leſſor of the plaintiff, and that it was quite out of the ſtatute of 27 Eliz.

The whole, according to the Chief Juſtice, turned upon the mother's joining in the ſettlement; *that* was a good conſider-

ation to John the ſon; the *quantum* was not material; he purchaſed his wife by his mother's concurrence. As to the objection, that John was ſeized, and could have made the ſettlement without the mother, and that in truth no real or good conſideration moved from her at all, for that ſhe ſtill had her annuity charged upon part of the lands; it was anſwered, that the application to the mother, ſhews, that John Hamerton could not have made a ſettlement, agreeable to the friends of the intended wife, without the mother, and any conſideration given by the mother, would make her a purchaſer for her younger ſons. The Chief Juſtice added, that it was plain the mother intended her ſons ſhould be preferred to the daughters of the marriage, and this was as plain as if he had heard the mother ſay, "I will not part with my annuity, ſecured upon the whole lands, and take a ſecurity for it upon part of the lands, unleſs you will prefer my ſons to your daughters," that the ſettlement could have no other meaning, and that any conſideration, moving from a parent to a child, is good.

The

The ſettlement in the caſe of *Jones* v. *Marſh* (5), maintained itſelf againſt the ſubſequent mortgagee, upon the ſtrength of the portion which was proved to have been paid by the receipt indorſed upon the back of the deed. But this caſe alſo contained an ingredient ſimilar to that which in the above cited caſe of *Roe* v. *Mitton*, formed the *ſingle* ground of the deciſion; and the opinion of Lord Chancellor Talbot agrees with that which was pronounced from the bench of the common pleas. "Beſides," ſays his Lordſhip, in this caſe, "an eſtate moved from the defendant's father's mother, and ſhe may be conſidered, in ſome reſpects, as a purchaſer of the limitations made to her grandchildren; ſo that it would be very hard to call this a voluntary ſettlement."

(5) Caſ. Temp. Lord Talb. 64.

The doctrine of *Roe* v. *Mitton*, has been expreſsly recognized in a late caſe determined in the court of chancery (6), which is alſo a further exemplification of the principle of the rule above attempted to be explained. The circumſtances of the caſe, as to this point, were as follow:

(6) *Myddleton* againſt *Lord Kenyon* and others, 2 Vez. Jun. 391.

A. having an eſtate in fee, of 6000 *l.* a year in value, and being alſo tenant for life, without impeachment of waſte, of another eſtate of the annual value of 5000 *l.* with the reverſion in fee after an eſtate tail in B. his only ſon by a former marriage, became greatly indebted, by mortgage, annuities, and otherwiſe, to the amount of 100,000 *l.* A and B. joined in conveying both eſtates to truſtees, upon truſt by ſale or mortgage, or by ſale of timber, or out of the rents and profits, to pay debts, and to apply ſo much of the rents and profits of what ſhould remain unſold, as they ſhould think proper, as a ſinking fund, and to pay the reſidue to A. and to ſettle the remaining truſt eſtates, (ſubject to an annuity of 1000 *l.* to B. for the joint lives of him and A.) upon A. for life, without impeachment of waſte, with power to leaſe for twenty-one years only; remainder to truſtees to preſerve, &c. remainder, (ſubject to a jointure, to the wife of A. and to portions for children,) to the joint appointment of A. and B. and in default thereof to the appointment of B. ſurviving, and in default thereof to B. in tail male;

male; remainders to the other ſons of A. in tail male; remainder to B. in tail general; remainder to the daughters of A. in tail with croſs remainders; remainder to B. in fee: with powers of leaſing, and full powers of management in the truſtees.

On a bill filed by A. to be relieved againſt this ſettlement, one of the grounds taken by the counſel for the plaintiff was, the want of conſideration; A. having been deceived into a notion of the expediency of his ſon's co-operation, whereas, in truth, he was perfectly competent, out of the unſettled eſtate, to effect all the purpoſes of the arrangement without his ſon. But that, although the ſon's joining was no effective accommodation, he, the ſon, had been a moſt diſproportionate gainer by the tranſaction, without any ſacrifice or conceſſion on his part. But the Lord Chancellor, with great clearneſs, decided, that as to the alleged want of value to ſupport the ſettlement, there was no colour for that imagination: there was conſideration enough to ſupport the deed at law againſt

creditors or purchaſers; and there was conſideration enough, not only to ſupport the beneficial limitations of the eſtates to the ſon, but all the other limitations in which the father was concerned; and his Lordſhip, in alluſion to the caſe of *Roe* v. *Mitton*, laſt above-cited, obſerved, that much ſlighter conſiderations had been held ſufficient in courts of law to ſupport ſuch a ſettlement, even againſt the moſt favoured caſe—that of a fair and honourable purchaſer. The conſideration, his Lordſhip added, was a conſideration of value; the thing parted with, the intereſt conveyed, the charge undertaken, were all of great and eſſential value, and would ſupport, to the full extent, all the effects of this ſettlement, if any attempt were made to queſtion it as void at law.

SECTION VI.

OUR reaſon ſuggeſts, that to ſatisfy this legal exigency of ſome ſort of valuable conſideration for the ſupport of ſettlements and conveyances, there ſhould not only be ſomebody to whom the character of purchaſer will conſtructively apply, but there is alſo need of ſome eſtate or intereſt, out of which the uſes, limitations, or proviſions may conſiſtently be derived or purchaſed. In *Roe* v. *Mitton* the ſon was ſeized in fee; the conſideration moved from the mother; and the limitations, to her youngeſt ſons were purchaſed out of the eſtate of the eldeſt. In the caſe of *Myddleton* v. Lord *Kenyon*, the ſettled eſtate was changed by the recovery into a preſent fee ſimple in the father, out of which the ſon might, with colour of reaſon, be conſtrued to have purchaſed all the intereſt in that eſtate beyond what he could claim before under his father's marriage ſettlement, by his conſent to join in the recovery.

The

The caſe of *Jenkins* v. *Kemyſhe* or *Keymis* is become very important from the frequent references to it in later caſes. The fulleſt report of it is in Levinz (1); where the circumſtances of the caſe, connected with the point in queſtion, ſtood thus upon the ſpecial verdict. Sir Nicholas Keymis being tenant for life, with remainder to his ſon Charles in tail *general*, remainders over, the father and ſon, on the marriage of the ſon with Blanche his firſt wife, and in conſideration of the marriage, and of 2,500 *l.* marriage portion, levied a fine, and ſuffered a recovery to the uſe of Sir Nicholas for life, remainder to Charles and the heirs of his body *on Blanche begotten*, remainder to the heirs of the body of Charles, remainder over, with power for Sir Nicholas by deed, to charge all and ſingular the premiſes with 2,000 *l.*; after which Sir Nicholas and Charles, without recital of the power, by leaſe and releaſe mortgaged part of the lands in fee to David Jenkins to ſecure the repayment of 2,000 *l.* borrowed of the ſaid D. J. with intereſt at

(1) 1 Lev. 150.

at a day mentioned: Sir Nicholas died; Blanche died *without iſſue* (*a*); Sir Charles married a ſecond wife, by whom he had iſſue the defendant, and died; and the money not being paid, the leſſor of the plaintiff, ſon and heir of David Jenkins, brought ejectment.

Firſt, it was reſolved, that the mortgage in fee by leaſe and releaſe was a bad execution of the power. And as to the ſecond point, it was contended that the ſettlement was merely voluntary, as to the iſſue by the ſecond marriage, ſince the marriage of the firſt wife, and the portion paid with her, could not extend to the iſſue by the ſecond wife. And it was alſo contended that there being a proviſo in the ſettlement, giving power to the father to charge the lands with the payment of 2,000 *l.* the ſettlement was void againſt Jenkins a purchaſer for a valuable conſideration, under the clauſe of the ſtatute 27 Eliz. c. 4. which makes conveyances, with

(*a*) The ſenſe of the caſe requires the inſertion of theſe words.

power

power to revoke, alter, or determine at pleaſure, void. But the court held that this power (being for a particular ſum) was not within the ſtatute; and, according to the report, Hale was of opinion, that the conſideration of the marriage and portion might extend to all the eſtates in the ſettlement; therefore judgment was given for the defendant.

It is to be obſerved, that before the recovery was ſuffered on the marriage of the ſon, the father was tenant for life, and the ſon had an eſtate tail of equal extent with that which he took under the marriage ſettlement. The limitations under the ſettlement were no new acquiſition of intereſt to Charles the ſon, and as to his poſterity, it leſſened the probability of ſucceſſion in the iſſue of a future marriage, for the ſubſiſting eſtate tail *general* in Charles, ſuppoſing no recovery to have been ſuffered, and only females to have been born of the firſt marriage, would have carried the eſtate over to the ſon by the ſecond marriage in excluſion of the firſt family. The ſpecial tail therefore created

created by the ſettlement was the material alteration; but as there was no iſſue by the firſt marriage to claim under it, and as, in fact, the perſon claiming under the new ſettlement would have been entitled without it, the caſe does not ſeem, in this view of it, to fall within the reaſon of the ſtatute 27 Eliz. c. 4.

It cannot be diſputed but that the iſſue of the firſt marriage, females as well as males, were proſpectively within the conſideration. And, if any ſuch had exiſted, they would have been entitled as purchaſers. And, though the limitation under which the defendant claimed, was beyond the actual reach of the marriage conſideration; yet, as, in truth, it was no *acquiſition* of intereſt, it would, perhaps, be too much to conſtrue it within the meaning of a ſtatute againſt fraudulent conveyances. The iſſue by the ſecond wife, ſo far from being the object of any voluntary bounty under the ſettlement, were diſpoſed at greater diſtance in the line of proſpective proviſion; and it would ſeem to be a harſh way of underſtanding the ſtatute in queſtion,

and authority will permit, it ſeems deſirable to found the doctrine, as much as may be, on a probable ſuppoſition of contract and ſtipulation.

In the caſe now under diſcuſſion ſome argument may be admitted to ariſe from the *remoteneſs* of the limitation in queſtion againſt the preſumption of intent to deceive a purchaſer; and this was one of the reaſons ſuppoſed by Lord Macclesfield, in his remarks on that caſe in *Oſgood* v. *Strode*, to have weighed with the court, and it muſt be owned, that this obſervation ſeems better founded than what in a line or two before had been advanced by way of reaſon for the deciſion, "that there was a fair and honeſt occaſion for making the ſettlement." For his inference from that poſition reſts upon a poſtulation which his Lordſhip perhaps would not himſelf have granted, viz. that if a ſettlement be primarily induced by a good motive, all the limitations comprized in it muſt be good, or, in other words, that a ſettlement cannot be upon good conſide-

ration as to one perſon, and voluntary and bad as to another (*b*). The argument from remoteneſs is only ſtrong as the ſtatutory preſumption or rule of evidence is weak; and as, at beſt, it is a doctrine in which the boundary line is but faintly marked, it may be better, as being more ſure, to rely upon the rule above attempted to be illuſtrated, and which has the countenance of recent and great authorities.

(*b*) This propoſition was fully admitted in *White* v. *Stringer*, 2 Lev. 106. by the Bench; and ſee the opinion of Ley C. J. 1 Roll. 306. See alſo Style 428.

SECTION VII.

(1) 2 Lev. 105.

THE caſe of *White* v. *Stringer* (1) calls for a particular attention, as there a limitation in a ſettlement, to which the conſideration of marriage did not extend, was ſupported againſt a ſubſequent purchaſer, though ſuch limitation was not within the reaſoning applicable to the order of caſes above examined. The caſe upon the evidence on an ejectment tried at bar was as follows: A father ſeized in fee, in conſideration of a marriage between his eldeſt ſon and A. and of a marriage portion to be paid, (which was afterwards paid) made a ſettlement upon the firſt ſon and the heirs of his body upon A. begotten, remainder to his ſecond ſon in tail, remainder to his own right heir (*a*). Three years afterwards the fa-

(*a*) In the report of the caſe mention is made of the father's being indebted. The fact was unimportant, but perhaps induſtriouſly inſerted to ſhew, that it had no weight with the court.

ther

ther ſold the lands for valuable conſideration, and died: the ſon and A. died without iſſue. And whether the remainder limited to the ſecond ſon was fraudulent and void as againſt the purchaſer, he having notice of the ſettlement, and a covenant in his deed of purchaſe againſt all incumbrances, ſave this remainder to the ſecond ſon, *againſt which he had taken a collateral ſecurity*, was the queſtion.

The relative ſituation of the parties to this ſettlement correſponds with what *would* have been the ſituation of the parties to the ſettlement in *Oſgood* v. *Strode*, as the caſe was hypothetically put by the Chancellor, when his Lordſhip obſerved, that "if old Lawrence the father had the whole eſtate, he did not ſee with whom he could contract, except with his ſon's wife and her friends, which could only make a good conſideration for the huſband and wife and her iſſue." In the caſe now before us, the whole eſtate moved from the father, and there was nobody to contract with him but the intended wife; the ſon had nothing to part with, and there-

fore was not in a predicament to be conſtrued a purchaſer, ſo that upon the whole of the caſe there was no one to ſtipulate or contract for the ſecond ſon, or, in other words, to purchaſe the limitation to him out of the fee ſimple of the father. As no conſideration therefore moved from any body to the father, out of whoſe eſtate this collateral (*b*) proviſion was to come, it muſt be conſidered as the reſult of his ſpontaneous bounty.

But the caſe diſcloſes upon an attentive examination ſome diſtinguiſhing circumſtances which may reconcile an acquieſcence in the ſupport there given to the collateral limitation with an adherence to the rule above inveſtigated; a rule which ſeems to eſtabliſh and preſerve a conſiſtency of conſtruction among a great majority of the caſes determined as to this queſtion upon

(*b*) To obviate any criticiſm upon the word collateral it may not be amiſs to obſerve, that the marriage is the point of reference; and in ſpeaking of limitations in a marriage ſettlement, they are called either direct or collateral with reſpect to the huſband and wife. It is plain they may be lineal to the ſettler, though collateral to the marryingparties.

the

the ſtatutes. The turn which the argument and deciſion took in the caſe before us was as follows: It was contended by Serjeant Maynard, who was counſel for the plaintiff, firſtly, that the conſideration of the marriage and marriage portion did not extend to the ſecond ſon, any more than if the father, upon the marriage and for the marriage portion, had ſettled it to the firſt ſon and heirs of his body; and afterwards on the ſame day had ſettled the reverſion upon the ſecond ſon in tail, remainder to his right heirs; this ſecond ſettlement would then have been clearly voluntary and void as to purchaſers. Secondly, that though there was notice, and though the ſettlement was excepted out of the covenant in the deed of purchaſe, the caſe was not altered by that circumſtance; for a man having notice of a fraudulent deed, may ſafely purchaſe, knowing that he cannot be hurt by ſuch a deed.

But Hale C. J. and Wylde J. held clearly, Raynsford agreeing, and Twyſden doubting, that, though one and the

ſame deed may be upon good conſideration as to one, and voluntary as to another, yet, in this caſe, it could not be imagined that the ſettler intended to deceive a purchaſer after the determination of an eſtate tail, which might endure for ever (*c*), when the conſideration of the purchaſe, as well as the remainder itſelf, by reaſon of the firſt eſtate tail, was of ſo ſmall a value. Secondly, that the purchaſer was not deceived in this caſe, for he not only had

(*c*) The involved ſtate of this queſtion appears from the different opinions pronounced even by Lord Hale, in the different caſes which have come before him, wherein ſuch limitations, as we have been conſidering, have occurred. In *Jenkins* v. *Keymiſhe*, we have ſeen him uphold the digreſſive limitation, by a conſtructive extenſion of the marriage conſideration, to all the limitations compriſed in the deed of ſettlement. In *White* v. *Stringer*, we obſerve him laying great ſtreſs upon the *remoteneſs* of the limitation in queſtion. But in the caſe of *Roſcarrick* v. *Barton*, Chan. Caſ. 217. where A. upon his marriage, ſettled lands on himſelf for life; remainder to his intended wife for life; remainders to his firſt and other ſons ſucceſſively in tail; remainder to B. in tail; Lord Hale, ſitting with the Lord Keeper, was of opinion, that the remainder to B. was voluntary and fraudulent againſt a purchaſer for valuable conſideration.

notice,

notice, but alſo a collateral ſecurity againſt this remainder.

With reſpect to this caſe of *White* v. *Stringer*, we may perceive that it contains two peculiarities, which materially diſtinguiſh it in principle from the preceding caſes—the *collateral ſecurity* taken, and the *inadequacy of the price given*, by the purchaſer. Since the ſtatute has not made a fraudulent conveyance a ſimple nullity, but has only empowered a ſubſequent purchaſer for valuable conſideration, to treat it as void; it ſhould ſeem that ſuch purchaſer is within the application of that maxim, which ſays, that every man may renounce a law which was made for his own benefit; and by reſorting to a collateral ſecurity, againſt a former voluntary conveyance or limitation, does not ſuch purchaſer diſavow his reliance on the ſtatute, and *tacitly affirm that*, which the ſtatute enabled him to conſider as void? Perhaps, too, when accompanied by circumſtances, ſuch as thoſe by which this caſe of *White* v. *Stringer* is characterized, the fact of *notice* to the purchaſer,

though always inoperative when ſtanding alone, imbibes a hurtful efficacy from the baſe intermixture of fraud. The reaſon of its operating no diſqualification as to a purchaſer, after a voluntary conveyance, reſts, as it ſeems, on the ſuppoſition, that he regarded the former alienation as void againſt himſelf, and therefore ſaw nothing in it to deter him from the completion of his purchaſe; but does not this ſuppoſition fail, if ſuch purchaſer impliedly confeſſes, by his reſort to a collateral ſecurity, an apprehenſion of the validity of the firſt conveyance? On the other hand, can the *offer* of a collateral ſecurity, in fairneſs of reaſoning, conſiſt with an *intent* to deceive a purchaſer, and if the ſecurity be proportionate, what advantage can the ſettler propoſe to himſelf by the contrivance? The purchaſer, too, can have no right to complain, if he bought with a full knowledge of circumſtances, and with the liberty of ſtipulating the terms of his own indemnity. But if we couple with the collateral ſecurity the ſmallneſs of the conſideration, which, as appears from the obſervation of the Chief Juſtice,

Juſtice, was given, in the caſe before us, for the ſettled lands, the integrity of the tranſaction becomes very queſtionable on the part of the purchaſer. Being doubtful, as it ſhould ſeem, whether the ſettlement on the ſecond ſon could be maintained or not, he gave a ſmall conſideration for the chance of overturning it, at the ſame time demanding a collateral ſecurity, as an eventual protection. It ſeems, in reality, to have been a ſort of experiment, and to ſavour more of champerty, than a fair and genuine purchaſe. It probably ſeemed to the purchaſer, that the title was a litigious one; and whether he judged rightly or not, he forfeited his claim to the patronage of the ſtatute, by his ſubtle endeavour to draw ſupport from it to a mere ſpeculating bargain.

The conſtruction of the ſtatute, as to the purity of conduct neceſſary to entitle a purchaſer to its protection, has been very uniform, from the caſe of *Upton* v. *Baſſet* (2), which was determined at the diſtance of ten years after the paſſing of the ſtatute, to the caſe of *Doe* v. *Routledge*, determined by

(2) Cro. Eliz. 444. and ſee the caſe related by Anderſon C. J. 3 Rep. 83. b.

by the late Chief Juſtice. All the reſolutions, as to this point, unite in the propoſition, that the purchaſer's caſe muſt be clear from every thing of an indirect, colluſive, or colourable appearance.

In the ſaid caſe of *Upton* v. *Baſſet*, it was ſaid by Anderſon, that a *petty* conſideration, as a groſs ſum of 500 *l.* given for lands worth 500 *l.* per annum, will not entitle a purchaſer to the aſſiſtance of the ſtatute, for no one ſhall have the benefit of this ſtatute, unleſs he comes to the land upon good conſideration, and without any *indirect* means. In *Doe* v. *Routledge*, the great diſproportion of the purchaſe money to the worth of the land, was conſidered by Lord Mansfield as indicating a palpable contrivance. In the caſe of *Jennings* v. *Selleck* (3), the reader may ſee an inſtance of relief granted by the court of chancery againſt a purchaſer for valuable conſideration, who, having notice of a prior voluntary conveyance, had taken a *collateral ſecurity*; and the relief, as to this point, after the court had reſolved that the leaſe by the father was deſigned as an advance-

(3) 1 Vern. 467.

ment

ment to the daughter, appears to have been ſingly grounded on this fact in the caſe. But when *notice*, *collateral ſecurity*, and *inadequacy of conſideration*, concur againſt a purchaſer, after a precedent voluntary conveyance, as in this caſe of *White* v. *Stringer*, it ſeems better to reſt the ſupport of the prior alienee wholly upon theſe facts, than to ſtir delicate queſtions by indeciſive obſervations, which unſettle the ſtudent, and leave the reſult of the caſe ambiguous.

There are many remaining points of difficulty to be attended to on the ſubject of the marriage conſideration, and the circuit its influence embraces. We obſerve in the caſe of *Beverley* v. *Gatacre* (4), that the great point with the judges was, whether the leaſe conveyed to truſtees, upon the marriage of A., in truſt that A. ſhould receive the rents and profits during his life, and then the wife, and then the iſſue male of the marriage, could be avoided by the ſubſequent vendee of the huſband *during his life*. We are to obſerve, that it was only upon the ſtatute 27 Eliz.

(4) 1 Roll. 305, cited in 3 Keb. 6. by the name of *Lydall* v. *Vanlee*.

that the purchaſer could proſecute at law for the recovery of the legal eſtate; for if the ſettlement, as to the eſtate of the huſband, was not avoided by that ſtatute, the legal eſtate was in the truſtees, and the huſband's ſecond conveyance being a tranſfer only of the beneficial intereſt, the purchaſer's reſort muſt have been to a court of equity: But the conveyance to the purchaſer would clearly have carried the legal eſtate as long as the huſband lived, if the ſettlement could have been avoided during his life by the operation of the ſtatute. It is difficult, however, to conceive, where no ſecret truſt can be inferred or ſuppoſed, upon what principle of ſound conſtruction, a perſon, who, having the dominion of the whole eſtate, makes a partial diſpoſition of it upon his marriage, by proviſions out of it for his future wife, and the poſterity of the intended marriage, (proviſions clearly ſupported by valuable conſideration) and reſerves, by the limitation or declaration of an uſe or a truſt, an intereſt in himſelf for his own life, can be conſidered, as to ſuch life intereſt, as within the reaſon or remedy of a ſtatute, made

for annulling fraudulent conveyances as againſt ſubſequent purchaſers for value.

We are now upon the caſes where the queſtion upon the ſtatute is, whether a deed is fraudulent or not from the mere want of conſideration, as againſt a purchaſer for value, and not upon thoſe caſes wherein the inference of fraud ariſes from the very ſecrecy of the truſt itſelf, and its inconſiſtency with the viſible purpoſe of the voluntary conveyance. And as to the circumſtance of the huſband's being in poſſeſſion, and the reputed owner, which is noticed in the caſe above-mentioned, it ſhould be remembered that, wherever the truſt itſelf can be ſupported, it would be an abſurdity to conſtrue poſſeſſion, according to that truſt, as a badge of fraud; for poſſeſſion is no further an indication of fraud, than as it raiſes the preſumption of a ſecret truſt, by contradicting the avowed intention of a pretended transfer of property. It ſeems, upon the whole, a little extraordinary, that the validity of the huſband's life intereſt could be drawn into controverſy upon the conſtruction of the ſtatute

27 Eliz.

27 Eliz. ſince it appears, that the truſt was avowed and oſtenſible, the poſſeſſion correſpondent to the truſt, and the intereſt of the huſband no alteration of property, on which the queſtion, whether voluntary or valuable, could properly ariſe. And it can hardly be doubted, but that, if a third perſon had ſettled the eſtate, inſtead of the huſband, the truſt for the huſband's benefit would have been protected againſt a ſubſequent ſale by the grantor, by the conſideration of the marriage and the marriage portion (*d*).

(*d*) There are many caſes which turn upon the doctrine that the wife and her friends are purchaſers, by the marriage of a general intereſt in the huſband's life eſtate, limited to him by the ſettlement; for ſhe marries in expectation of the maintenance and comfort ſhe is to derive out of it. It is in this character of a valuable purchaſer, with which the wife is inveſted, at leaſt in equity, that ſhe attracts the relief of that court againſt the clandeſtine agreements of the huſband, entered into by him, previouſly to the marriage, to the prejudice of his life eſtate under the ſettlement. See the caſe of *Roberts* v. *Roberts*, 3 P. Wms. 65. edit. Coxe.; and the caſe of *Neville* v. *Wilkinſon*, in the note to that caſe; and it ſeems clear that an action, upon ſuch an agreement, could not now be ſuſtained in a court of common law. Vid. the caſes of *Montefiori* v. *Montefiori*, 1 Blackſt. Rep. 363. *Jackſon* v. *Duchaire*, 3 T. R. 551.

SECTION VIII.

IF we conſider the caſe of a ſettlement by the owner of a real eſtate upon his marriage, whereby the uſual ſtrict uſes are limited to the huſband, wife, and iſſue, with an ultimate limitation to the right heirs of the grantor, there ſeems hardly a neceſſity for argument, to ſhew, that a perſon claiming this ultimate eſtate, as right heir of the grantor, takes nothing which can be the ſubject of diſpute upon the ſtatute 27 Eliz. It is a poſitive rule of law, that no man can raiſe a fee ſimple to his own right heirs, by the name of heirs, as *purchaſers*, either by conveyance of land, or by uſe, or by deviſe (1). Notwithſtanding ſuch conveyance, limitation, or deviſe, the heir will ſtill take by *deſcent*, and will, in conſequence, be quite out of the reaſon and contemplation of theſe ſtatutes of Elizabeth. Nor is it of importance, as to this point, whether the grantor limits an uſe to himſelf for life, or not; wherever a man is ſeized

(1) Hob. 30.

ſeized of the whole legal and beneficial eſtate, and makes a conveyance for particular eſtates, uſes, or truſts, whatever he does not part with remains in him, and if he limits, by *expreſſion*, a remainder to his right heirs, ſuch limitation takes no effect, but the reverſion abides with the grantor, and the expreſs eſtate is ſupplied by one, the ſame in quantity, though differing in quality (2).

(2) 10 Rep. 81. 1 Ld. Raym. 526.

It is true that by way of *uſe*, a man may limit an eſtate to his *ſpecial* heirs, ſo as to make them *purchaſers*; but that can only be where no freehold, either by expreſſion or implication, takes place in the grantor, with which the ſubſequent limitation to his ſpecial heirs can coaleſce. Thus (3) A. on his intended marriage, ſettled lands by deed and fine, to the uſe of himſelf and his heirs till the marriage, and afterwards to the uſe of his wife for life, remainder to the uſe of the conuſees in the fine and their heirs during the life of A. upon truſt to permit him to receive the rents and profits, remainder to the ſons of the marriage ſucceſſively in tail male, and

(3) *Tippin v. Coſin*, Carth. 272.

and for want of ſuch iſſue *to the heirs of* the body of the ſaid A. and for want of ſuch iſſue to the ſaid A. and his heirs. The marriage took effect, and they had iſſue only one daughter, married afterwards to G. T. who likewiſe had iſſue by the ſaid marriage one daughter, the leſſor of the plaintiff. A. the father, upon ſome diſpleaſure at the marriage, levied another fine, with proclamations to the uſe of the defendant C. and his heirs. The wife of G. T. died, then her father died without any other iſſue, and the widow entered and enjoyed the land during her life, and died. And the queſtion was, whether the daughter of G. T. the grand-daughter of the grantor, was barred by the laſt fine; which queſtion depended upon a previous queſtion, whether A. took an eſtate tail veſted in himſelf by the limitation to the heirs of the body, or that limitation to the heirs of the body was a contingent remainder, which the heir ſhould take by purchaſe, and not by deſcent. If ſhe took by purchaſe, the laſt fine was clearly no bar. It was determined that the expreſs eſtate given to the conuſees in the firſt fine, during the life of the ſettler, left no

room for the implication of a reſulting uſe to the grantor, with which the limitation to the heirs of the body could unite. But that the limitation was a new eſtate, *i. e.* an eſtate tail, and could be no part of the old eſtate, which was a fee ſimple. It was adjudged therefore to be a contingent remainder, which, after the grandfather's death, veſted in the leſſor of the plaintiff by purchaſe, and conſequently was not barred by the fine.

Now, as the foregoing caſe was circumſtanced, no doubt could ariſe as to the validity of the remainder in queſtion, upon the ſtatute 27 Eliz. for it does not appear that there was a valuable conſideration for the conveyance to C. and if ſuch conſideration had exiſted, yet the granddaughter was protected by the marriage and marriage portion. But if we ſuppoſe a valuable conſideration for the conveyance to C. and no iſſue by the marriage on which the ſettlement was made, but the claim to have been made by the heir of the body of the grandfather by a ſecond venter, then the queſtion whether fraudulent

lent or not within the above-mentioned ſtatute might perhaps ariſe.

The caſe laſt ſuppoſed muſt evidently reſt upon a different foundation from that of *Jenkins* v. *Keymiſhe*, where the reciprocity of intereſt in the father and ſon (the father being tenant for life, and the ſon having the remainder in tail) put both of them in a condition, according to the reaſoning in a former part of this eſſay, to become purchaſers of all the limitations in the ſettlement, whether collateral or lineal to the intended huſband. But, as before remarked, when the *whole* eſtate moves from the huſband, out of which the ulteriour limitations are to be drawn, there is nothing but the conſideration of the marriage and marriage portion to reſort to; and it is difficult to ſupport the efficacy of the conſideration of the marriage and portion to the extent of including within its expanſion, any limitation which lies *wholly* out of the path of the new generation, and the proſpects of the future family.

But we ſhould obſerve, that a limitation to the heirs of the body of the huſband, as in the caſe above hypothetically ſtated, is not *wholly* out of the line of the poſterity of the firſt marriage; for though by the courſe of events it may happen, that a ſon or daughter, by a ſecond marriage, may claim under ſuch a limitation; yet the limitation to the heirs of the body being preceded only by ſtrict limitations to the wife and ſons of the marriage, would comprehend the female iſſue of the firſt marriage, and would ſo far be clearly ſupported by a valuable conſideration; and, although, according to the opinion of Ley C. J. in the above cited caſe of *Beverley* v. *Gatacre*, the operation of the ſtatute may affect one limitation, ceaſe as to a ſucceeding one, and return and attach upon others more remote, yet ſuch an intermittent operation with reſpect to different limitations in the ſame *ſettlement*, will not ſupport an inference of ſuch diviſibility of effect on the ſame *limitation* in a ſettlement, as ſuch limitation proſpectively regards thoſe who *are* and thoſe who are *not* within the conſideration of the

the marriage. Such a doctrine attracts the full weight of the argument from the abſurdity of making a tranſaction fraudulent *ex poſt facto*, and by relation; for here it would not be *a petitio principii* to ſuppoſe the limitation good at the time of making it, ſince the evidence of ſubſequent facts could not in this caſe be coupled with the original act, ſo as to warrant the conſtruction of a primarily fraudulent intent: but the *original* act ſtanding clear from all ambiguity, and being grounded on a plain conſideration of value, could by no ſort of artificial reaſoning that did not include a contradiction in ſenſe and terms, be brought within the ſtatute by preſumptive conſtruction of fraudulent intent.

The limitations in the caſe of *Jenkins* v. *Keymiſhe*, we have obſerved, might derive their value from the reciprocity of ſituation in the father and ſon, which gave them a capacity of contracting for the collateral limitations in the ſettlement; but if in *that* caſe the whole fee ſimple had been in the *huſband*, and all the eſtates had moved

from *him*, ſuppoſing the limitations to ſtand as they did, (except an expreſs limiting away of the uſe during the grantor's life, as in *Tippin* v. *Coſin*, ſo as to prevent a veſted entail in the huſband by a conjunction of eſtates,) it ſeems that the limitation to the heirs of the body of the huſband would have been *wholly* beyond the compaſs of the marriage conſideration, as plainly including none of the objects of the firſt marriage: for in that caſe the preceding limitation to the iſſue *generally* by the firſt wife engroſſed all the objects of *that* union, ſo as to exclude the ſuppoſition of any motive for making the ulteriour limitation to which the conſideration of the firſt marriage could lend ſupport. If we take up the caſe thus circumſtanced, and further ſuppoſe it to contain an ultimate limitation to the right heirs of the huſband, this is only, as has been already obſerved, a part of the old fee ſimple, and therefore wholly out of the queſtion as to any of the ſtatutes of fraudulent conveyances.

But the caſe preſents another aſpect and different conſequences, if we ſuppoſe the whole

whole eſtate in the lands to move from a third perſon, for then a limitation to the right heirs of the huſband, after limitations to all the iſſue of the marriage, is creative of a new eſtate beyond the bounds of the marriage conſideration, and, as it ſhould ſeem, *in*-ſupportable againſt a ſubſequent vendee of the grantor. But yet, where the preceding limitations do not comprize *all* the iſſue of the marriage, as where proviſion is only made for the *male* poſterity, the principle of conſtruction, for which ſome arguments have before been offered, ſeems to bring ſuch ultimate limitation to the right heirs of the huſband within the influence of the marriage conſideration as being a denomination under which the female progeny are comprized (4).

(4) Vide 9 Mod. 106. *Neeve and others* v. *Keck.*

To purſue this train of obſervation a little further, let us ſuppoſe a third perſon to make the ſettlement, with a limitation, after eſtates tail to the iſſue of the marriage in the uſual form, to the right heirs of the huſband, but without giving any eſtate of freehold to the huſband to which ſuch ultimate limitation could be

joined, as in *Sir Thomas Tipping*'s caſe (5); where, upon a marriage, a ſettlement was made by a third perſon to the uſe of the huſband for ninety-nine years, remainder to truſtees during the life of the huſband to ſupport contingent remainders, remainder to the wife for life, remainder to the firſt and other ſons of the marriage, remainder to the heirs of the body of the huſband, remainder to the right heirs of the huſband. In this caſe of *Sir Thomas Tipping*, the remainder to the heirs of the huſband was plainly contingent, the eſtate not moving from the huſband, and he having no freehold into which ſuch limitation to his heirs could be incorporated. There the truſtees having joined to bar the ulteriour remainders, the Court of Chancery refuſed to puniſh them for a breach of truſt, at the inſtance of the right heir, whom they conſidered as a *purchaſer* in a ſenſe contradiſtinguiſhed from a taking by *deſcent*, but as wholly a *volunteer* as to every purpoſe of relief in that court. If the ſettlement in that caſe had reſted on articles, and the court had been called upon by the right heir of the huſband to compel

(5) Cited 2 P. Wms. 358. This caſe is alſo reported by Gilbert, p. 34. under the title of *Tipping* v. *Pigot*, at the end of which the learned Reporter adds a doubt, which it has been one of the objects of the foregoing pages to reſolve.

compel a ſpecific performance by the heir of the grantor, the caſes determined upon this ſubject would not juſtify an expectation that the court would lend its aſſiſtance; for they ſhew that the favour of that court decreaſes in the ratio of the remoteneſs of the limitation, and this was in truth the great argument in defence of the truſtees in this caſe of *Sir Thomas Tipping*, where the limitation was more remote than in any of the caſes cited in a former part of this eſſay, as examples of articles decreed in favour of collaterals. Now, if inſtead of articles we ſuppoſe an actual conveyance as the foundation of the ſettlement in a caſe circumſtanced like this of *Sir Thomas Tipping*, and that the eſtate had ſubſequently been ſold by the grantor to a purchaſer for valuable conſideration; and that the huſband had afterwards died without iſſue; what deciſion muſt have been made by a court of law as between the right heir of the huſband, and the grantor's vendee? The limitation would be voluntary beyond the reach of diſpute. If we ſay, with the court in the caſe of *White* v. *Stringer*

above

above cited, it may be voluntary, but it cannot be preſumed fraudulent againſt a purchaſer, becauſe it was very remote; occaſion is given to a remark that the ſame fact branches into oppoſite deductions, and, by conſequence, that the principles of juſtice are diverſe, on the oppoſite ſides of Weſtminſter Hall; that if you reſort to one judicature, the remoteneſs of the limitation on which you rely is a title to protection and ſupport, while this very ſame remoteneſs of your claim renders the other deaf to your application.

CHAP. III.

SECTION I.

THE valuable conſideration of matrimony which falls ſhort of theſe remote limitations in ſettlements *before* marriage, is *wholly* wanting to ſettlements made *after* marriage. It has been obſerved, however, in an early part of this eſſay, that a family ſettlement, though made *after* marriage, if the ſettler was unincumbered at the time of making it, has generally been ſupported againſt the claims of creditors under the ſtatute 13 Eliz. c. 5.

But the ſtat. 27 Eliz. for the protection of purchaſers, has been conſidered as more ſevere againſt voluntary ſettlements, and as calling for leſs equivocal teſts of honeſt intention; and this difference which has been taken as to the operation of theſe ſtatutes, it may be here ob-

obſerved, is another inſtance of the principle which has governed the conſtruction of them in courts of judicature. For if in queſtions upon theſe ſtatutes the deciſion hung upon the circumſtantial evidence of actual fraud, what ſenſe could there be in the diſtinction between the caſes of a creditor and a purchaſer? *ſubſtantia non recipit majus aut minus.* Fraud does not ſwell and contract its proportions with the varying magnitude of the object, nor can its exiſtence be more or leſs preſumable, in common reaſon, according to the degrees of inconvenience and loſs occaſioned by the act which gives riſe to the ſuſpicion. It would be ſtrange to maintain that the favour which the law bears towards purchaſers could induce a logical inference of fraud where *they* were concerned, which would not ariſe where intereſts leſs guarded were in danger.

If we look to the *preventive* efficacy of theſe ſtatutes, and regard their proviſions as having in view the radical overthrow of fraudulent artifices, by requiring ſuch circumſtances to characterize an honeſt

act as only honeſt intention can aſſume, or in other words, by placing parties under a *diſability* to commit fraud, we ſhall ſee wiſdom in that violent conſtruction, which, according to the moral rule *necis artifices arte perire ſuâ*, converts ambiguity into evidence of what it was meant to diſguiſe, and erects, on a foundation of common experience, a ſort of artificial preſumption of fraudulent intentions from equivocal tranſactions. In this view, we ſhall, perhaps, ſee no abſurdity in the language of ancient books, wherein certain tranſactions are ſaid to be '*intended* and *preſumed* to be made with intent to deceive purchaſers,' or 'to be fraudulent in *judgment of law*' (1), or where, with bolder expreſſion, it was ſaid in the before cited caſe of *Beverley* v. *Gatacre* (2), that the queſtion for the court was, whether, there being no fraud at firſt, there was not *fraud in law* afterwards againſt a purchaſer. Such artificial preſumption (for ſuch, perhaps, may thoſe preſumptions be called, which are not the reſult of moral reaſon applied to the particular circumſtances of a caſe, but receive their ſtrength from poſitive law) being

(1) Vid. *Burrel's* Caſe, 6 Rep. 72. b.

(2) 1 Roll. 305.

being the creature of civil authority, may be adapted to the exigencies of ſociety, ſo as, it ſhould ſeem, more readily to ariſe in one caſe than another, according as intereſts, more or leſs cheriſhed by the law, are affected, without reference to any complexional diverſities in the facts on which the queſtion of fraud ariſes. Not that it is here intended to be maintained, that this preſumption is wholly dependent for its exiſtence upon the favour with which the intereſts endangered are regarded by the law. The propoſition muſt be underſtood only to mean, that where two caſes are parallel as to the circumſtances indicating the intent, the preſumption of fraud will *ſooner* ariſe in behalf of a purchaſer, than of an intereſt leſs anxiouſly protected by the law. And although theſe ſtatutes act wholly by preſumption, ſo as in moſt caſes to diſpenſe with the neceſſity of actual proof, yet we are not to ſuppoſe that ſuch preſumption of law is always an inflexible rule of conſtruction precluding denial, however true it may be, that under certain circumſtances, which it is the endeavour of

of this treatiſe to diſtinguiſh and aſcertain, the inference of fraud under theſe ſtatutes may become ſo plenary and incontroulable as to rank among thoſe violent preſumptions of law which will not endure contradiction.

Family ſettlements made *after* marriage, where no circumſtances of diſtinction, ſuch as will hereafter be noticed, vary their conſtruction, are fraudulent againſt ſubſequent purchaſers; although againſt *creditors*, whoſe demands have *ſubſequently* ariſen, ſuch ſettlements have been generally ſupported.

Woodie's caſe, cited in *Colvile* v. *Parker* (3), is an early inſtance of this rule of conſtruction; where a huſband, after marriage, voluntarily aſſigned a leaſe by way of jointure for his wife, and took the profits and afterwards ſold it to a purchaſer for a valuable conſideration; and it was adjudged to be within the ſtatute 27 Eliz. though at firſt it was not made upon any truſt to be revoked, nor contained

(3) Cro. Jac. 158.

tained any clauſe with ſuch effect; but (in the words of the perſon citing the caſe) becauſe it was a voluntary conveyance at firſt, it was intended fraudulent at the beginning. The caſe of *Douglaſs* v. *Ward*, may be produced as an inſtance of the rule of conſtruction, which has brought ſettlements after marriage within the ſenſe of fraudulent under the ſtatute 27 Eliz. It muſt be owned, indeed, that the court of Chancery ſeemed in that caſe to ſtretch the operation of the ſtatute with undue ſeverity; for the decree went ſo far as to vacate the firſt ſettlement as to a part of the ſettled eſtate, which did not appear to have been ſubjected by the ſecond ſettlement to the wife's jointure; in doing which they appear to have neglected the rule which has ſince prevailed of limiting the extent of the avoidance to the demands of the intereſt to be protected. In the caſe of *Lavender* v. *Blackſtone* (4), the ſettlement, which was made after marriage, was regarded as purely voluntary, and therefore fraudulent againſt a ſubſequent mortgagee: in which caſe a proviſion for payment of debts,

(4) 2 Lev. 146.

debts, which was oftenſibly the principal object of the tranſaction, and which, if made *bona fide*, might, under ſome circumſtances, have imparted ſupport to the ſettlement, turned wholly to its prejudice by being coupled with an inconſiſtent poſſeſſion and exerciſe of ownerſhip by the grantor.

In another caſe (5), by articles made between Sir R. S. and the plaintiffs, reciting that Sir R. S. was ſeized of the manors of H. and A. wherein were ſuppoſed to be ſeveral rakes, veins, pipes, and flats of lead ore; and that Sir R. S. was minded to take the plaintiffs to be partners with him in managing all mines to be diſcovered in the ſoil of the ſaid manors, it was agreed, that the ſaid Sir R. S. and the ſaid plaintiffs ſhould become partners together for 21 years in certain proportions, according to which Sir R. S. was to have an advantage in conſideration of his ownerſhip in the ſoil: and valuable mines having been diſcovered and worked, and Sir R. S. being dead, the plaintiffs brought their bill againſt the ſon and widow to have the benefit of the

(5) 2 Vern. 326.

agreement. The defendants ſet up a ſettlement by Sir R. S. of his eſtate made after marriage: and, according to the report, the court took time to conſider of it, but inclined to decree for the plaintiffs as being in the nature of purchaſers, and becauſe all voluntary conveyances were void, as againſt purchaſers by the ſtatute 27 Eliz. c. 4.

So in a caſe reported in Tothill's Tranſactions (6), where the plaintiff bought land of the defendant, which the defendant had previouſly conveyed to the uſe of himſelf, his wife, and ſon, it was decreed, that the plaintiff ſhould have the land againſt all.

(6) Tothill 225.

The caſe of *Taylor* v. *Jones* (7) was briefly thus. A huſband, to whom 1,733 *l.* ſtock was deviſed after his marriage, veſted the ſame in truſtees for the benefit of himſelf for life, of his wife for life, and afterwards for the benefit of his children; and a bill was brought by his ſimple contract creditors to obtain a decree

(7) 2 Atk. 600.

decree for the payment of their debts out of the ſaid ſtock. The caſe is looſely reported, but we collect from it that there were creditors upon demands ariſing both before and after the ſettlement of this ſtock, and that the principal queſtion was, whether the debts contracted after the ſettlement were within the ſtatute 13 Eliz. c. 5. It appeared to the Maſter of the Rolls that the word 'others' ſeemed to be inſerted in the preamble of that ſtatute to take in all manner of perſons, as well creditors *after* as *before* the ſettlement, whoſe debts ſhould be defrauded. And the enacting clauſe, he obſerved, was ſtill ſtronger, becauſe the word *creditors* was not mentioned, but the general words 'perſon or perſons.' The ſettlement therefore was decreed to be void, both as againſt creditors, whoſe debts aroſe antecedent, and thoſe whoſe debts were ſubſequent, to the ſettlement. And if ſuch a ſettlement was void as to creditors, we may ſafely conclude, that it would have been held void as againſt purchaſers, who are not only the principal favourites of the law, but for whoſe protection, according to the

beſt opinions, a ſtronger expreſs proviſion has been made by the ſtatute 27 Eliz. than by the 13th of the ſame Queen has been made, for the protection of creditors, and the other objects of that Act.

The truſt, declared by this ſettlement, for the huſband, and his continuance in poſſeſſion, were circumſtances inſiſted upon by the Maſter of the Rolls as indications of fraud; but as they do not appear at all neceſſary to ground the deciſion of the court, there is the leſs reaſon for ſcrupling to queſtion the accuracy of the obſervation.

Where the principal facts are fully ſufficient to ground the judgment, it may ſometimes be of inconvenient tendency to bring in all the accompanying circumſtances of the caſe as acceſſory proofs of the fraudulent intent. Subordinate circumſtances thus adverted to only as corroborative evidence, have ſometimes been but haſtily viewed; and though the obſervations upon them may not prejudice a caſe, wherein the ſettlement or conveyance

is clearly void on other grounds, yet they are apt to leave in the mind of the reader a confuſed apprehenſion of a point which in ſome other caſe may happen to conſtitute the ſingle ſubject for adjudication.

It would be too much to conſtrue a truſt, which is agreeable to the expreſs intent of a tranſaction appearing upon the face of the deed, and which is conſonant to the uſual method of framing family ſettlements, a *fraudulent* truſt, to deceive either creditors or purchaſers; and it ſeems clear, that *poſſeſſion*, agreeing with ſuch expreſs truſt, cannot be conſtrued but according as ſuch truſt is conſtrued. Thus, ſo long ago, as in the caſe cited by Tanfield, J. in *Colvile* v. *Parker* (8), it was ſaid, that if the huſband had made an aſſignment of the leaſe to his wife's friends, in conſideration of a portion, and had afterwards taken the profits thereof, *as in reaſon he ought during his life*, and then had ſold the term, it would not have been within the ſtatute. This point has been cleared up by the caſe of *Cadogan* v. *Kennet* (9), a caſe

(8) Cro. Jac. 158.

(9) Cowp. 432.

deſerving great attention, not only as being illuſtrative of this important diſtinction between the different characters of truſts, but as tacitly diſcloſing the opinion of the court, that a fraudulent truſt, for the huſband, would have vacated the *whole* ſettlement, as far as it regarded the ſubject of that truſt, although the ſubſequent proviſions were within the marriage conſideration.

The ſingle point, in that caſe of *Cadogan* v. *Kennet*, was, the imputed fraudulency of the truſt *for*, and poſſeſſion *by* the huſband, and as the entire property in the goods taken in execution on the *fieri facias* was in diſpute, it appears, that this was a circumſtance of fraud, admitted capable, if ſubſtantiated, of ſubjecting every thing included under that truſt, notwithſtanding the validity of the ſubſequent truſts conſidered by themſelves, to the claims of the judgment creditors. The truſt for the huſband, in the caſe of *Beverley* v. *Gatacre*, was not charged with any poſitive fraud as a truſt; and this occaſioned the remark of Doderidge, J.

that he did not ſee how a truſt, admitted to be without fraud at the beginning, could become fraudulent by conſequence. But the queſtion, in that caſe, ſeems to have been, whether the conveyance to the truſtees, as far as reſpected the benefit the huſband was to receive, was not *voluntary*, and therefore to be *conſtrued* fraudulent under the ſtatute 27 Eliz. c. 4. The doubt, therefore, only affected the huſband's life intereſt. There ſeems, indeed, to be a clear difference between an open truſt, ſuch as that which was declared in *Beverley* v. *Gatacre* for the huſband, and which brings ſo much of a ſettlement as is contained under it within the ſtatute, by ſhewing it to be voluntary, and that *ſecret* truſt which is preſumed from a contradictory poſſeſſion: for in this latter caſe the ſecrecy and inconſiſtency are circumſtances of general fraud, which, where it occurs, infects the whole tranſaction. The objection grounded on the poſſeſſion of the huſband in *Cadogan* v. *Kennet*, and *Taylor* v. *Jones*, was capable of being anſwered by ſhewing that ſuch poſſeſſion was conſiſtent with the

oſtenſible truſt, and where it is conſiſtent with the oſtenſible and avowed truſt, the queſtion is bounded to the effect of ſuch truſt; which in *Cadogan* v. *Kennet*, was held to be fair and honeſt, and agreeable to the nature and courſe of ſettlements. But if the truſt had been *evidenced* by the poſſeſſion, and the *poſſeſſion* had been contrarient to the viſible purpoſe of the ſettlement(10), ſuch ſecrecy and duplicity would have been evidence of fraud to impeach the *whole* tranſaction. In *Taylor* v. *Jones* all the truſts were voluntary, or rather indications of a voluntary conveyance, being created *after* marriage, but there no ſecret truſts could be implied from the poſſeſſion of the huſband, which was correſpondent to the voluntary ſettlement. In *Cadogan* v. *Kennet*, the ſettlement was *upon* marriage, and therefore not voluntary, and there being nothing contradictory in the poſſeſſion by the huſband, the poſſeſſion was an innocent ingredient in the caſe, where the only queſtion ought to have been, whether the truſt declared for the huſband brought the caſe within the ſtatute, as to ſo much of the ſettlement as fell within that

(10) *Haſtlington* v. *Gill*, 3 T. R. 620. note a.

that truſt. Such was the queſtion in *Beverley* v. *Gatacre:* and the point was well ſettled by the reaſoning of Lord Mansfield in *Cadogan* v. *Kennet.* In *Taylor* v. *Jones,* the whole ſettlement was voluntary and void, and the emphatic words of the Maſter of the Rolls are worthy of remembrance. "It is upon theſe reaſons that I muſt decree for the plaintiffs, the creditors, againſt the wife and children; for though I have always great compaſſion for a wife and children, yet, on the other ſide, it is poſſible, if creditors ſhould not have their debts, that *their* wives and children may be reduced to want (*a*)."

(*a*) By the comments of the Chancellor in *Dundaſs* v. *Dutens,* 1 Vez. Jun. 196. the reader will perceive that the relief in *Taylor* v. *Jones* ſtands on rather queſtionable grounds. In the caſe above alluded to, the Chancellor was of opinion, that ſtock was not liable to creditors, and could not be touched, in equity, any more than on a *fieri facias.* But ſee *Horn* v. *Horn,* Ambl. 79. were it ſeemed that if the plaintiff had not taken out the Ca. Sa. the bill would have been proper to ſubject the ſtock in the hands of the truſtees: and ſee the caſe of *King* v. *Dupine,* Reg. lib. A. 1744. fol. 91.

Goodright,

Goodright, on the demiſe of *Humphreys* (11) and others, againſt *Moſes*, came before the court in the form of a ſpecial caſe, which was as follows: In December 1709, Dorothy Curlew, in conſideration of an intended marriage between herſelf and Joſhua Reade, ſettled the premiſes in queſtion, from and after the ſaid marriage, to the uſe of herſelf for ninety-nine years, if ſhe ſo long lived, without impeachment of waſte, remainder to truſtees to preſerve contingent remainders, remainder to herſelf for life, remainder to the ſaid Joſhua Reade for life, remainder to the firſt and other ſons of the intended marriage in tail, remainder to the daughters in tail, remainder to ſuch perſon or perſons as the ſaid Dorothy, whether covert or ſole, ſhould, by deed or will, appoint; remainder to the ſaid Dorothy in tail, remainder to her right heirs. The marriage took effect, and the ſaid Dorothy died, leaving her huſband, Joſhua Reade, and only one child, Elizabeth, ſurviving her; which Elizabeth became afterwards the wife of Thomas Harris. In January 1747, the ſaid Joſhua Reade, Thomas Harris,

(11) 2 Blackſtone, 1019.

Harris, and Elizabeth his wife, levied a fine, the uſes of which were declared to Walter Grant and Joſeph Humphreys, and their heirs, in truſt as to the rents and profits to and for the ſaid Joſhua Reade for life; and after his deceaſe, in order that the ſame rents and profits might be applied to the ſupport of the ſaid Thomas Harris and Elizabeth and their children, during the life of the ſaid Thomas Harris; and after his deceaſe for the maintenance of the ſaid Elizabeth Harris, and her children, during the life of the ſaid Elizabeth; and after their ſeveral deceaſes, that the truſtees ſhould, by ſale or mortgage, raiſe a ſum not exceeding 700 *l.* for the younger children of the ſaid Thomas and Elizabeth, (excluſive of the right heirs of the ſaid Elizabeth, on account of the ſubſequent limitation of the ſurplus to their uſe); and after raiſing the ſame, to convey the reſidue and remainder of the premiſes to the right heirs of the ſaid Elizabeth for ever. Thomas Harris ſurvived Joſhua Reade, and Elizabeth Harris ſurvived her ſaid Huſband Thomas Harris. In July 1759, Elizabeth Harris demiſed the

the premiſes to the defendant, Thomas Moſes, for twenty-one years, who, accordingly, entered and took poſſeſſion, and laid out 100 *l.* in repairing the premiſes. In December 1771 Elizabeth Harris died, and in May 1772, Joſeph Humphreys, the ſurviving truſtee, Thomas Harris, eldeſt ſon and heir of the ſaid Elizabeth Harris, and all the younger children of the ſaid Elizabeth, in conſideration of 2,150 *l.* conveyed all the premiſes in queſtion to J. B. and his heirs. And the queſtion being, whether, under theſe circumſtances, the plaintiff could recover; the opinion of the court, as delivered by De Grey, C. J. was, firſt, that the deed of 1747 was only a voluntary conveyance, within the true meaning of the ſtatute 27 Eliz. being founded only upon a good, and not a valuable conſideration, and therefore could not be ſet up againſt a *bona fide* purchaſer. Secondly, that the defendant, being a leſſee at *rack-rent*, was a *bona fide* purchaſer of his term for a valuable conſideration.

SECTION II.

THE voluntary ſettlement, in this caſe of *Goodright* v. *Moſes*, being grounded upon a fine, ſome thoughts are naturally ſuggeſted by it, on the manner in which this ſtatute of Elizabeth operates, with reſpect to theſe aſſurances upon record. It is conſidered in *Fermor*'s caſe (1), that a fine, levied to ſecret uſes to deceive a purchaſer, may be avoided by an averment of fraud againſt it, upon the ſtatute 27 Eliz. c. 4. In *Fitz-James* v. *Moys* (2), and in *Leach* v. *Dean* (3), which were caſes of recoveries, ſuffered to voluntary uſes, the effect given to the ſtatute was only that of avoiding the deeds declaring the uſes, while the recoveries themſelves were left to their accuſtomed operation. And there ſeems to be no reaſon for conſidering

(1) 3 Rep. 79. et vid. Jenk. 254. pl. 45.

(2) 1 Sid. 133.

(3) 1 Chan. Rep. 78.

ſidering fines and recoveries (*a*) under diſtinct points of view, as to this ſubject of enquiry. It may tend, in a great degree, to reconcile any apparent diſcordance in the books, on this head, if we conſider the aſſurances themſelves, or the limitations of uſes upon them, as avoidable under theſe ſtatutes, according as the intereſts to be protected require the one or the other effect. Where a tenant in tail in poſſeſſion levies a fine, as in *Lavender* v. *Blackſtone*, or ſuffers a recovery, as in *Fitz-James* v. *Moys*, and *Leach* v. *Dean*, above cited, for a voluntary and fraudulent purpoſe, within the ſtatute, there appears to be no reaſon for any avoidance or diſturbance of the aſſurances themſelves: a more beneficial operation will be given to the ſtatute, in ſuch caſes, if the fine or recovery be conſtrued to enure

(*a*) Common recoveries are within the expreſs ſaving of the ſtatute 13 Eliz. c. 5. but they are ſaved only as *common recoveries*; no particular exemption is deſigned to be given to them as *conveyances* from the general operation of the ſtatute. And at *common law*, in caſe of recovery by default, *fraud* might be *generally* averred. Plowd. 47.

to

to the benefit of the purchaſer, according to the extent of his intereſt or claim, and only ſo much or ſo many of the former uſes, as are inconſiſtent with this object, to be revoked and annulled. The ſecond conveyance may be conſidered as a new and effectual declaration of an uſe by the recoveree or conuſor. So alſo, where a tenant of the freehold, and a perſon having the next veſted remainder in tail, join in ſuffering a recovery, or, as in the caſe juſt conſidered, of *Goodright* v. *Moſes*, in levying a fine, and declare voluntary uſes upon it, it appears that the ſtatute may effectuate its object, by making void ſo much of the declaration of uſes as is repugnant to the intereſt which is purchaſed by the valuable conſideration, and by ſupporting that intereſt as taking effect by a freſh conſtructive limitation of an uſe by the tenant in tail, who, to this purpoſe, is ſeized of an eſtate in fee ſimple, by the reſultancy of the former inefficient uſe. And this reaſoning correſponds with the rule in *Beckwith*'s caſe (4), where it was reſolved, that "if A. tenant for life, and B. in reverſion or remainder, levy

(4) 2 Rep. 58.

levy a fine *generally*, the uſe ſhall be to A. for life, the reverſion or remainder to B. in fee, for each grants that which he may lawfully grant, and each ſhall have the uſe which the law veſts in them, according to the eſtates which they convey over." In the above-cited caſe of *Goodright* v. *Moſes*, Joſhua Reade, who was tenant for life, and Elizabeth Harris, in whom both the remainder in tail and the reverſion in fee were veſted, by virtue of the marriage ſettlement of Dorothy, her mother, together with Thomas Harris, the huſband of Elizabeth, joined in the voluntary conveyance by fine, and when afterwards, upon the deaths of all the other parties, the ſaid Elizabeth Harris made the leaſe in queſtion, the ſtatute, by avoiding the former limitations as far as they were adverſe to the durability of this intereſt, placed Elizabeth Harris, with reſpect only to the leaſe ſo made by her, in the ſame ſituation in which ſhe would have been had no uſe been declared upon the fine which was levied, namely, that of tenant in fee ſimple, for ſuch ſhe would have become by force of the reſulting uſe of that fine.

By

By the operation, therefore, of the ſtatute 27 Eliz. c. 4, the purchaſer of the leaſe, in the caſe of *Goodright* v. *Moſes*, derived his intereſt under the fine by the ſubſtitution of an uſe within the capacity of the leſſor to create: ſo that in this caſe there was no neceſſity for the avoidance by this ſtatute to reach the aſſurance itſelf. But if we ſuppoſe, for the ſake of illuſtration, a caſe wherein the iſſue in tail, during the life of the anceſtor, levies a fine to voluntary uſes, and afterwards grants a leaſe for 21 years, to commence from a day to come, at rack rent, (ſo as to make the leſſee a purchaſer for value,) and then the anceſtor dies before the commencement of the leaſe; there is, as it ſeems, no way in which the ſtatute can help ſuch purchaſer, but by avoiding the fine itſelf; for if we were to ſuppoſe only the *declaration of uſes* in ſuch a caſe avoided, as far as they interfered with the leaſe, nothing but the eſtoppel of the fine would be left; from which a *ſtrange* intereſt could draw no *direct* ſupport, and which would be inconſiſtent with the ſuppoſition of any reſulting uſe in the conuſor, out

of which the leaſe could be conſtrued to be derived. We obſerve, however, that, in the caſe which has been ſuppoſed, if the force of the fine were wholly removed by the ſtatute, the iſſue in tail who made the leaſe, would, upon the death of the anceſtor, become, as to the leaſe, tenant in tail in poſſeſſion; but yet, the leaſe, not being within the enabling ſtatute 32 H. 8. c. 28. would be indefeaſible *only* during the life of the leſſor. This, it ſeems, would be the effect of conſtruing the fine *wholly* vacated as to the leaſe. But this would not be a conſtruction agreeable to the ſpirit and intention of the ſtat. 27 Eliz. which makes *only ſo much* of the voluntary conveyance or aſſurance void in any caſe, as is neceſſary to be removed out of the way, in order to give room and perfection to the ſubſequent eſtate or intereſt which is to be preſerved and effectuated.

It may, with ſtrong appearance of reaſon, therefore, be inferred, that in ſuch a caſe as was laſt ſuppoſed, the leaſe, by force of this ſtatute, would open the bar

of the fine ſo as to let in, quoad the leſſee, the eſtate tail of the leſſor. But if the ſtatute could ſuſpend the working of the fine till after the commencement of the leaſe, any further avoidance of its effect would be injurious, for after the commencement of the leaſe the fine could only work to its advantage. The effect of this tranſpoſition wrought by the temporary avoidance of the fine (*b*) would be to make it the caſe of a leaſe by tenant in tail, by whom a fine is afterwards levied; which brings it within the application of the doctrine in *Crocker* v. *Kelſey* (5), whereby it appears, that if tenant in tail makes a leaſe for years not warranted by the ſtat. 32 H. 8. and afterwards levies a fine to a ſtranger, or even to the reverſioner, and dies leaving iſſue, neither the ſtranger or reverſioner can avoid the leaſe during the lives of the iſſues in tail, for if they could, it muſt be by reaſon of the right of entry transferred by the fine, which

(5) Sir W. Jon. 61, 62. and ſee 2 Roll. Rep. 498.

(*b*) This notion of a temporary avoidance is not a doctrine unknown to the common law. Vid. 7 Rep. 8 b. 9 a. Co. Litt. 46 a. Godb. 325.

would have come to the iſſue if no ſuch fine had been levied; but the law condemns all alienations of right only, whether it be a right of entry or right of action; and though the reverſioner, by ſuch fine levied to him, would be in of his old reverſion, yet as to the leſſee, the eſtate tail would have continuance in law (6). By this conſtructive *partial* ſuſpenſion of the operation of the fine, in the caſe above ſuppoſed, all the *voluntary* uſes would be poſtponed to the intereſt of the purchaſer of the leaſe, without any greater diſturbance of the legal conſequences of the fine than was neceſſary to give perfection to ſuch *valuable* intereſt.

(6) Vid. 2 Rep. 7. *Lillingſton's* caſe, and ſee alſo *Errington* v. *Errington*, 2 Bulſt. 42, 43 *per* Coke C. J.

SECTION III.

In returning to the ſubject of voluntary ſettlements after marriage, our attention is attracted by a modern caſe (1); in which there were no circumſtances but the bare fact of the ſettlement's being made *after* marriage, and which, though appearing to reſt on the reſpectable motive of making proviſion for a family, was adjudged to be clearly within the ſtatute 27 Eliz. by the ſame judges, who afterwards determined the caſe of *Doe* v. *Routledge*. R. E. and M. his wife, after their marriage in 1766, conveyed the premiſes in queſtion to truſtees, in truſt for the ſaid R. E. during life, remainder to his wife for life, remainder to the iſſue of the ſaid R. E. and M. in tail, remainder, in default of iſſue, to the right heirs of the ſaid R. E. and afterwards in 1769 the ſaid R. E. and M., by indentures of leaſe and releaſe, made a mortgage in fee of the

(1) *Chapman* ex dem. *Staverton* v. *Emery*, Cowp. 278.

premiſes in queſtion to D. S. for ſecuring the payment of 750 *l.* the mortgagee having full notice from a third perſon that the premiſes had been ſettled as before mentioned. The court had no difficulty, notwithſtanding what was urged by the counſel for the defendant as to this circumſtance of notice, in deciding for the leſſor of the plaintiff, who was the heir of the mortgagee.

(2) 2 Bro. Ch. Rep. 148. *Evelyn* v. *Templar.*

In a later caſe, (2) to the ſame effect, determined in the court of Chancery, where a ſettlement was made by C. E. after marriage, in which the lands were conveyed to a truſtee to family uſes, but reſerving a power to ſell, and containing a clauſe, whereby it was covenanted that the purchaſe money ſhould be paid to the truſtee in order to be by him laid out in land to be ſettled to the ſame uſes. C. E. afterwards ſold the land, and the purchaſer having notice of the covenant, paid the money to C. E. who ſoon after died inſolvent, leaving a widow and ſeveral children; by whom a bill was brought againſt the repreſentatives of the deceaſed

ceaſed purchaſer to have the purchaſe money repaid to the truſtees to be laid out to the uſes of the ſettlement. And though it was contended, that, as the covenant appeared upon the face of the abſtract, and conſequently the purchaſer had full notice thereof, the money ſhould be conſidered as cloathed with the ſame uſes with which the land was cloathed as againſt a purchaſer with ſuch notice, yet it was ſaid by the court, that, although it would have been as well if, at firſt, the voluntary ſettlement had not been thought ſo little of, yet that the rule was ſuch, and ſo many eſtates ſtood upon it, that it could not be ſhaken; and it was adjudged accordingly.

And where a leaſe after marriage was aſſigned to a truſtee in truſt for the huſband for life, remainder to his wife for life, remainder to the iſſue of the marriage; the premiſes being alſo ſubject to a mortgage, and afterwards A. B. contracted for and abſolutely purchaſed the premiſes for a valuable conſideration, and without notice of the ſettlement or mort-

gage, it was decreed, that the truſtee ſhould convey the legal eſtate to the purchaſer, to whom the ſettlement was ordered to be given up, and that the huſband ſhould pay off the mortgage money (3).

(3) 1 Atk. 624. ſed vid. Reg. Lib. 1736. fol. 188.

Again in the late caſe of *Pringle* v. *Hodgſon* (4), where a huſband made a ſettlement after marriage of ſtock ſtanding in his wife's name, which was transferred to truſtees for the purpoſe, the ſettlement was conſidered as fraudulent and void againſt creditors.

(4) 3 Ves. Jun. 617.

Thus a pretty uniform ſeries of reſolutions (5) have fixed the law as to ſettlements made after marriage, where they have been dictated only by a ſpontaneous movement of affection or prudence. Nor have the courts yet conſidered the circumſtances of the family at the time, or the degree of moral exigency in the call for theſe proviſions as furniſhing a conſideration ſufficient to take a caſe out of the ſtatute 27 Eliz. Yet, it cannot be ſaid, that a ſettlement by a huſband upon a wife and children deſtitute of any certain proviſion,

(5) Vid. Ambl. 288. 1 Ch. Ca. 225. 1 Vern. 294. 2 Vern 272.

proviſion, does not, according to the rule of common benevolence by which human actions ought reciprocally to be judged, raiſe a preſumption in favour of his motives. But the ambiguity of ſuch a caſe has, notwithſtanding this, always been conſidered as bringing it within the purview of this ſtatute, the general policy of which requires that its operation ſhould not be affected by ſuch plauſible diſtinctions as might ſerve perhaps only to exerciſe the dexterity, and multiply the diſguiſes of fraud. *Common* preſumption has, therefore, been made to give way to the *legal* preſumption ariſing upon this ſtatute; and the integrity of contracts and ſafety of property, for which this law provides, is conſidered as depending upon a more rigorous teſt of honeſty than is required by the rules of ordinary caution, or conſiſtent with the claims of common urbanity.

SECTION IV.

BUT though the courts have ſo far appeared to acquieſce in this political conſtruction of the ſtatute, yet they have always ſhewn an alacrity in admitting circumſtances to bring theſe ſettlements after marriage within the ſupport of a valuable conſideration. Thus, wherever it has appeared in proof that ſettlements *after* marriage have been grounded on covenants or agreements entered into *before* marriage, they have been regarded as wholly out of the ſtatute, and ſuſtainable againſt the claims of creditors or ſubſequent purchaſers (1). Accordingly, in a caſe (2) where, upon a treaty of marriage between F. D. and the daughter of W. S. it had been agreed by articles reciting that a portion ſhould be paid, (which was proved to have been afterwards paid,) that F. D., who was poſſeſſed of a legal eſtate in the lands in queſtion for a term of ninety years, and entitled to the truſt of the inheritance

(1) Vid. Eq. Ca. Abr. 354. and vid. 3 Keb. 6. *White* v. *Drake.*

(2) 1 Vent. 193. Sir *Ralph Bovy's* caſe; et vid. 2 Keb. 700. *Lloyd* v. *Fox.*

ritance of the ſame lands, ſhould convey them to himſelf and his wife, and the heirs of their two bodies by way of jointure for his wife, and proviſion for the family, and the marriage had taken effect; and afterwards F. D., by indenture, reciting the ſaid articles, had aſſigned his term of ninety years to W. S. and another in truſt for himſelf for life, remainder to his wife for life, and afterwards to the heirs male of their two bodies; and by the ſame deed limited the truſt of the inheritance in the ſame manner; and then had granted a rent, out of the ſame lands, of 400 *l. per annum,* for valuable conſideration, with power to the grantee to enter and hold till ſatisfaction, and afterwards the ſaid F. D. and his wife being dead, and the rent being in arrear the grantee had entered, and then the truſtees had aſſigned the term of ninety years to Sir W. D. the heir male of the ſaid F. D. and his wife and leſſor of the plaintiff; it was without difficulty adjudged, that the ſettlement, being in purſuance of articles made before the marriage, had not the leaſt colour of fraud to enable a purchaſer to avoid it;

and

and that an agreement for ſuch a ſettlement would have been ſufficient.

The efficacy aſcribed, in the caſe above cited, to a mere verbal engagement before marriage, in furniſhing a conſideration ſufficient to ſupport ſubſequent ſettlements, has flowed from a ſtrong predilection to theſe family proviſions, by which the courts appear to have been uniformly actuated. The firſt caſe occurring in the books in which the doctrine is recognized is that of Dame *Griffin* v. *Stanhope* (3), which, as far as it reſpects the the point under conſideration, is as follows: Upon a treaty of marriage between R. G. and S. the ſaid R. G. promiſed to aſſure 1,000 *l. per annum* to his intended wife for her jointure, his eſtate being worth 12,000*l. per annum*; and ſhe repoſing confidence in ſuch promiſe married him without any aſſurance or covenant in writing whatſoever. But the ſaid R. G. afterwards, by deed conveyed lands of great value to ſome friends of his wife to the uſe of her the ſaid S. for the term of one hundred years, if ſhe ſhould live

(3) Cro. Jac. 454.

ſo

ſo long, to commence after his death; and by an indorſement on the deed its intent was expreſſed to be, that when there ſhould be a jointure of 1,000 *l. per annum* ſettled upon the ſaid S. according to the agreement before marriage, then the leaſe ſhould be void; and it was held by the court that this leaſe being made in purſuance of the ſaid promiſe, was grounded upon a good conſideration and not fraudulent.

And in the caſe of *Lavender* v. *Blackſtone*, above cited, it was admitted, that if the ſettlement, which was made after marriage, had been *conformable* to the promiſe in that caſe proved to have been made before marriage, it would have ſtood upon a ſufficient conſideration to be maintainable even againſt a purchaſer.

This doctrine has been further confirmed by a caſe determined in the court of Chancery (4); from which caſe, however, it appears doubtful, where a ſettlement, made *after* marriage in purſuance of ſuch verbal agreement made *before*

(4) 2 Vez. 304. *Ramſden* v. *Hylton*.

marriage, reſts wholly on articles, how far equity will aſſiſt the iſſue, on their application for ſpecific relief, againſt adverſe claimants. But the point ſeems to turn upon the diſtinction between the claims of general creditors, and thoſe of purchaſers and incumbrancers, which laſt are always objects of too ſtrong a predilection, for any conſideration to prevail with a court of Equity to deprive them of their advantage at law.

H. H. in the year 1688, executed a deed, whereby the family eſtate was conveyed to truſtees, and their heirs, on truſt, to raiſe ſeveral ſums, with a *proviſo*, that as ſoon as J. H. his ſon, ſhould marry, the truſtees ſhould convey the legal eſtate to John and his heirs. In 1693, J. H. married the daughter of Sir R. M. and, in 1694, made a ſettlement of his eſtate, whereby, reciting that he had intermarried as aforeſaid; and that Sir R. M. and D. M. his wife's grandmother, in conſideration of the ſaid marriage, and the covenants, grants, and agreements above-mentioned, had paid, or agreed and ſecured to pay, to J. H. 2,000 *l.* for the marriage

marriage portion of his ſaid wife;" he covenanted to convey his eſtate, by fines or recoveries, to certain uſes; and further covenanted that, till the fines were levied, he and his heirs would ſtand ſeized to thoſe uſes. The uſes were to himſelf for life, remainder, as to part, to his wife, towards her jointure; remainder to the firſt and other ſons of the marriage in tail male; remainder to truſtees for ninety-nine years, in default of iſſue male, on truſt, that if there ſhould be no iſſue male, and two or more daughters of the marriage, to raiſe 8,000 *l.* for their portions, to be paid to them at twenty-one years of age, or marriage. J. H. died in 1707, leaving by this marriage, ſix children, two ſons, Richard and John, and four daughters. His widow died in 1709. Richard and John ſucceſſively came into the poſſeſſion of this eſtate and died, living the ſiſters, without iſſue male. And three bills were brought; the firſt by creditors; the ſecond by Sir R. U. deviſee of the real eſtate of John, ſubject to his debts and incumbrances, to have the will eſtabliſhed and the truſts thereof performed; and part of the

the relief prayed in theſe two bills was to have the ſaid ſettlement ſet aſide. The third bill was brought by the huſband of one of the ſiſters and his wife, to have the benefit of the ſettlement, as far as it related to the truſt term of ninety-nine years for raiſing 8,000 *l.* for daughters in default of iſſue male; a fourth part of which ſum was claimed by her, in the event, which had happened, of the failure of iſſue male of her father and brothers.

Among the objections made to the performance of theſe articles, it was inſiſted, that as they were made after marriage, they muſt be conſidered as voluntary. And that, though it was true in general, that a ſettlement made after marriage, if a portion was paid, or ſecured to be paid at the time of ſuch ſettlement, though no articles or agreement were entered into before marriage, was equal to a ſettlement before marriage; yet, in this caſe, it could not be inferred from the recital, that the portion agreed to be paid at the time of the marriage, related to any propoſed ſettlement to be executed afterwards; ſo that the huſband

huſband was to have the portion whether the ſettlement was made or not, and therefore ſuch ſettlement moved voluntarily from him. But the Chancellor, after taking notice that there was no pretence or colour for a bill to be relieved againſt this ſettlement, which there was no fraud or impoſition to impeach; and that the true queſtion aroſe upon the third bill, containing the prayer for a ſpecific execution, obſerved, that there were many inſtances, where articles after marriage had been decreed to be performed in that court, after a length of time had elapſed; and that, though it was rightly admitted, that the payment of a portion made a ſettlement after marriage equal to one executed before; it was wrongly objected, that, in this caſe, the words of the ſettlement did not ſo refer to the agreement, in conſideration of the portion, as to warrant the inference of its being in purſuance of ſuch agreement; for the portion was paid in conſideration of the covenants, grants, and agreements after mentioned.

With reſpect to an objection which had been drawn from the ſettlement's being exe-

cutory and reſting in covenant, the Chancellor remarked, that this was not altogether the caſe, for that the covenant to ſtand ſeized amounted (*a*) to a ſettlement of the equitable eſtate, which was all that the ſettler had in him at the time. But ſuppoſing it had reſted wholly in articles, inſtances had been frequent, wherein ſuch articles on marriage were never meant to be carried into execution by an actual ſettlement: yet, as againſt the parties and the family, performance of ſuch articles had been compelled, though not perhaps againſt purchaſers. Length of time, he obſerved, was no good objection, for it muſt not be computed from the date of the articles, but from the event which had happened. Theſe ladies had no

(*a*) In the caſe of *White* v. *Thornborough*, Prec. in Chan. 428. where there was no covenant to ſtand ſeized in the mean time, as in the caſe cited in the text, but the ſettlement reſted purely in covenant, Lord Harcourt ſeemed to think, that, from the circumſtance of the portion's being paid at the time, and the Chamberlain of London's being a party, (it being an orphan's portion), it was more than articles, and ought to be looked upon as a ſettlement, though a very infirm and imperfect one. But this notion of an infirm ſettlement was thought unintelligible by the bar.

right

right to their demand until failure of iſſue male, which had happened but lately. Supposing Richard or John had made thoſe conveyances or ſettlements, and incurred all thoſe debts; and left iſſue male, the iſſue male would have had a right to have theſe articles carried into execution for their benefit, notwithſtanding the behaviour of Richard or John, not as againſt mortgagees and incumbrancers *without notice*, but as againſt volunteers under John or his *general creditors* (*b*) only. And if the iſſue male would unqueſtionably have this right, there is the ſame reaſon that the daughters ſhould have the ſame benefit.

Thus, in the caſe laſt above cited, we obſerve, that, though it has been clearly eſtabliſhed at law, that a ſettlement after

(*b*) The reader ſhould be reminded, that, by general creditor, here, is meant, a creditor whoſe debt had exiſtence before the voluntary ſettlement. He may have read in a former part of this eſſay, that ſuch family ſettlements after marriage, without any conſideration but that of proviſion for children, is ſupported in all courts againſt the creditor by contract, poſterior to the ſettlement.

marriage, if made in purſuance even of a parol agreement before marriage, ſhall not be impeached by a purchaſer for valuable conſideration, yet, where ſuch a ſettlement after marriage reſts in covenant or articles only, and application is made to a court of equity for its aid in compelling a ſpecific execution; it will not lend its aſſiſtance to the prejudice of a purchaſer or mortgagee, though it will enforce execution as againſt the general creditor (*c*). The

(*c*) In *White* v. *Thornborough*, Prec. in Chan. 426. which was a caſe wherein a ſettlement, reſting in covenant only, was made after marriage, in conſideration of a portion, the court decreed performance in favour of a daughter of the marriage againſt creditors, who had even acquired the legal eſtate by the will of the heir at law of the ſettler. But the reporter takes notice that ſeveral at the bar were much diſſatisfied with this decree, as thinking that the court ought not to have interfered, to take from juſt creditors their advantage at law.

It is plain that this decree carried the relief a ſtep beyond the caſe of *Ramſden* v. *Hilton*, and perhaps beyond the proper boundary line, ſince the creditor in *White* v. *Thornborough* was not the general creditor againſt whom Lord Hardwicke allowed ſuch articles after marriage (the caſes being the ſame in principle, whether

The tender regard, therefore, of this court for the intereſts of valuable purchaſers, operates, in ſuch a caſe, independently of the ſtatute 27 Eliz. which, according to the meaſure of relief aſcribed to it by the conſtruction of legal courts, gives no advantage to purchaſers where they claim againſt a precedent ſettlement, circumſtanced as that which has juſt been conſidered. The Chancellor, however, in that caſe, gave a clear opinion that, viewing the articles as a *ſettlement*, there was no colour for ſetting them aſide in favour either of purchaſers or creditors, and that there was a ground for regarding the articles in queſtion, in this light of an actual equitable ſettlement, ſince, if the ſubject matter had been legal, the covenant to ſtand ſeized would have ſo operated at *law* (*d*).

It

whether the articles be in conſideration of a portion paid after marriage, or of an agreement before marriage) to be carried into execution, but a creditor ſtanding on the ſame foot with a purchaſer or incumbrancer, ſince, to a claim which was valuable, he added the legal eſtate.

(*d*) In *Trevor* v. *Trevor*, 1 P. Wms. 622. notwithſtanding a covenant to ſtand ſeized until the ſettlement

It ſeems, therefore, that if ſuch ſettlement after marriage, in purſuance of an

ſhould be made, was contained in the articles, where the ſettler's eſtate too was *legal*, the Chancellor would not treat them as an actual and final ſettlement, ſince, if they had been left *ſo* to operate, the intention of the parties would have been contravened; but carried them *virtually* into execution, againſt a volunteer under the articles, by directing a ſettlement correſpondent to the true intention of the parties. But, in the ſame caſe, the court refuſed to diſturb the eſtate of a purchaſer of a ſmall part of the ſame premiſes for a valuable conſideration, without notice. And, it ſeems, that the interference of courts of equity, in directing ſettlements variant from the verbal import of the articles on which they are grounded, and rectifying ſuch as correſpond in *terms* ſo as to carry into effect the clear intention of the parties, is never *extended* to the diſturbance of any valuable purchaſer, although the ground of relief, in theſe caſes, involves an admiſſion of valuable intereſt in the objects in whoſe favour it is exerted. And though ſuch valuable purchaſer may have bought with notice of the articles, or, of both articles and ſettlement where the articles have been literally executed, yet he *is* not affected by *ſuch* notice, for he is not expected to be cognizant of the rules of equity, in like manner as of the rules of law. Ambl. 288. 517. It is true, that in *White* v. *Thornborough*, this ſpecies of relief was given againſt the creditor, whoſe claim was in equal degree with that of a purchaſer for value, ſince he had obtained the legal eſtate by deviſe, but that decree was thought very extraordinary: et vid. the caſe Prec. in Chan. 425.

agreement

agreement before marriage, reſts upon a conveyance perfected at law, it will be valid as againſt ſubſequent creditors and purchaſers, in all courts. But the anxiety of courts of equity, for the ſafety of purchaſers, has induced them, where ſuch valuable poſt-nuptial ſettlements reſt on articles, to refuſe their aſſiſtance in compelling a ſpecific performance, againſt valuable purchaſers who have obtained a legal conveyance; and, in this inſtance, their reſpect to purchaſers appears to have carried them beyond the meaſure of conſtructive ſeverity, to which courts of law have extended the operation of theſe ſtatutes. But the relief afforded by courts of equity, in compelling ſpecific performances, has always been conſidered as the ſubject of pure diſcretionary juſtice, to which they are moved only by ſpecial reaſons of comparative equity, in the balance of contending claims; according to the obſervation of Lord Talbot, in the caſe of *Collet* v. *De Gols* and *Ward* (5) where his Lordſhip remarked, that "though the rule be the ſame in courts of equity as at law, upon the conſtruction of ſtatutes,

(5) Caſ. Temp. Talb. 69.

yet, where an act is to be *carried into execution* in equity, there are certain rules to be obſerved, which will bind equally in the caſe of an act of parliament, as of the common law." In all caſes, therefore, where the juſtice of the caſe awaits the deciſion of the court, independently of theſe ſtatutes of Elizabeth; the queſtion whether the purchaſer has had *notice* or not, is a cardinal point in the tranſaction.

Thus, in the caſe of *Ramſden* v. *Hilton*, above conſidered, Lord Hardwicke obſerved, that if there had been iſſue male of John, and they had come into that court for a ſpecific performance, ſuch aſſiſtance muſt have been denied them againſt incumbrancers or purchaſers *without notice*. And the rule ſeems to be, that, wherever a purchaſer is before a court of equity as the general object of its patronage, and not as a perſon reſting his claim upon this ſtatute, he muſt appear to have been, at the time of his entering into the contract, without notice of the former alienation or contract. For ſince ſuch a ſettlement, as in the caſe laſt conſidered, being grounded

on

on a precedent agreement, would have prevailed at law, if, inſtead of articles, it had ſtood upon a legal conveyance, ſo equity, where ſuch ſettlement reſts only on articles, will follow the law by enforcing them againſt a purchaſer, unleſs the conduct of its favourite has been clear from all ſuſpicion. But where, though the caſe comes into equity for the ſake of the relief, both the contending claims are legal, ſo that the circumſtances of the diſpute conſtitute a caſe immediately within the operation of the ſtatutes; courts of equity will not, it is apprehended, on mere equitable principles, put a different conſtruction on theſe ſtatutes of Elizabeth from that which prevails in courts of law. Thus in *Evelyn* v. *Templar*, above cited, where the caſe turned wholly upon the ſtatute 27 Eliz. Lord Chancellor Thurlow declared himſelf reſtrained by the caſes, from allowing any effect to the circumſtance of the purchaſer's having notice. But in a caſe wherein a valuable purchaſer has taken a legal conveyance of the ſubject of his contract, after a ſettlement of the ſame by *articles* made ſince marriage, but purſuant

purſuant to an agreement before, though it ſeems, that, courts of equity will generally refuſe to follow the law, in derogation of ſuch purchaſer's title, yet, where the purchaſer can be fixed with notice, it will depart from its neutrality and enforce the articles notwithſtanding the valuable conſideration (*e*). So on the other hand, if a purchaſer, under *articles*, for valuable conſideration, comes into a court of equity for ſpecific relief againſt an antecedent voluntary ſettlement, he will return back empty handed, if it appear in proof that he bought with notice of ſuch prior claim (6). Though, where, in ſuch caſe, he has obtained a conveyance, a court of law, notwithſtanding the circumſtance of

(6) Vid. *Biſcoe* v. the Earl of *Banbury*, Chan. Caſ. 287. et vid. *Oxley* v. *Lee*, vid. Reg. lib. 1736. fol. 188. where the want of notice in the valuable purchaſer was the foundation of his title to relief.

(*e*) In the caſe of *Ferrars* v. *Sherry*, 2 Vern. 384. the ſettlement probably reſted in articles only, and then the queſtion of notice to the purchaſer might properly come before the court. But that caſe extends conſtructive notice very far. Its authority is denied by Lord Hardwicke. Ambl. 289. The ſaid caſes of *Ferrars* v. *Sherry* and *Biſcoe* v. the Earl of *Banbury*, have carried to extremity the doctrine of implied notice. The ſenſible mean is conciſely ſtated in *Moor* v. *Bennet*, 2 Chan. Ca. 246.

notice,

notice, muſt ſupport his title, upon the uniform conſtruction of the ſtatute.

It may not be improper in this place to remark, that, wherever the tranſaction either with the firſt claimant or with the ſubſequent purchaſer, is not executed by a legal conveyance, but one or other of them reſts in contract or covenant, the caſe muſt neceſſarily come into a court of equity; ſince a court of law, while it ſtands in ſuch a predicament, can give no judgment upon it under the ſtatute 27 Eliz. Thus in the caſe of *Holford* v. *Holford* (7), where the purchaſer claimed by *articles*, and the court of chancery directed an iſſue to try the fact of fraud; application was made to the court on the part of the plaintiff, to direct that an actual conveyance ſhould be admitted, in order that the queſtion, upon the ſtatute of Elizabeth, might come into iſſue; otherwiſe, though the queſtion of fraud might be examinable generally, yet the particular conſtructive fraud upon the ſtatute could not be made a point for the jury. But the application was unſucceſsful.

(7) Cham. Caſ. 218.

SECTION V.

IT appears, however, that the indulgent inclination of the courts of equity towards theſe caſes of ſettlements after marriage, induces them to look very narrowly into the tranſaction, in order to find a ground for ſuſtaining them againſt creditors. Perhaps, a mere *recital* in a family ſettlement of an agreement before marriage, unſupported by collateral circumſtances, has not yet been ſuffered to outweigh the objections upon the ſtatute, yet, it ſeems, that very ſlight concomitant facts have given to theſe recitals the effect of proofs. Thus, in an anonymous caſe (1), where a ſecond marriage ſettlement was recited to be made in conſideration that the wife had parted with her intereſt under a former ſettlement, which appeared to have been made after the marriage, but which was recited to have been made in conſideration of a portion ſecured; the

(1) Prec. in Chan. 101.

the court, without *proof* of any previous agreement for the prior ſettlement, preſumed ſuch agreement, and upon the ſtrength of ſuch preſumption decreed the ſecond ſettlement not voluntary againſt creditors. The ſcanty report of that caſe leaves us ignorant of any circumſtances which may have given credibility to the recital, but it is eaſy to imagine facts to have been made out to fill up the outline with the features and colourings of ſtrong probability.

In the caſe of *Ramſden* v. *Hylton*, above noticed, the court declared itſelf ſatisfied that the portion was paid, which was recited to be the object of an agreement on the marriage, in purſuance of which, the ſettlement after marriage, containing ſuch recital, was made. The Chancellor, putting together all the circumſtances of that caſe, was perſuaded of the verity of the recital; but he expreſſed his opinion to be, that proof only of the *agreement* for the portion, as the conſideration of the conſequent ſettlement, was ſufficient to make the iſſues of the marriage valuable

valuable purchaſers; and he declared his wonder that ſo much proof had been produced at ſuch a diſtance of time. From which intimations there is ground for ſuppoſing that ſome circumſtances not appearing in the Report added weight to the recital in the ſettlement, and that in ſuch caſes ſome teſtimony from corroborative facts is expected to be produced, though with great allowance for diſperſion by length of time.

(2) 1 Ves. Jun. 196. *Dundaſs* v. *Dutens.*

In a ſubſequent caſe (2) Harriet D. being entitled under the will of P. D. her father, to 1000 *l.* in the 3 *per cents.* and to ſome other ſtock, and alſo to a ſhare of the reſiduary eſtate, married J. C. After the marriage a ſettlement by indenture was made, reciting a parol agreement before marriage to ſettle her property; and ſettling it in purſuance of that agreement upon truſtees in truſt out of the annual proceeds to pay 100 *l.* *per annum* to the wife for her ſeparate uſe, and to pay the remainder of the produce to the huſband for life, then to the wife for life, then among the children of the marriage as the ſurvivor

vivor ſhould appoint. Harriet C. the wife, being dead, a bill was filed by the creditors of J. C. praying that the ſettlement might be declared fraudulent and void againſt creditors, and be ſet aſide, and for an account of the effects of the teſtator P. D. and that the reſidue, after payment of his debts, legacies, and funeral expences, might be aſcertained; and that the ſhare thereof to which Harriet C. was entitled, and ſo much ſtock as belonged to her under the will, and was yet unſold, might be applied to the payment and ſatisfaction of the creditors of J. C. The Chancellor was of opinion in favour of the ſettlement, notwithſtanding it was urged at the bar, and admitted by the court, that a *parol* agreement or ſettlement previous to marriage is abſolutely void; and that a ſubſequent marriage is not a part-execution of ſuch an agreement to take it out of the ſtatute of frauds and perjuries, and enable the court to proceed in compelling a complete performance. We may obſerve in this caſe, that, though the court ſeemed to carry very far its complai-

ſance to theſe recitals, the validity of the ſettlement in queſtion was not thought neceſſary to ground the denial of relief, for the Chancellor was ſtrongly of opinion that creditors could not obtain ſatisfaction of their debts out of *ſtock* by the aſſiſtance of that court any more than by execution at law. It may be remarked alſo that in the above caſe the wife's property (3) was the ſubject of the ſettlement, which may be looked upon as a circumſtance corroborative of the recital, by heightening the probability of a pre-exiſtent agreement; or may be regarded as furniſhing of itſelf a conſideration for the ſettlement ſufficient to ſupport it without reſort to the ſuppoſition of any agreement before marriage. For it appears to be very conſonant with reaſon and uſage that the wife's fortune ſhould not be given up to the huſband without ſome previous ſtipulation for proviſions for herſelf and future family, and therefore a recital to this effect in a ſettlement after marriage of the wife's property finds credit with a court of equity, which will befriend no ſubſequent claims in de-

(3) Vid. 2 Atk. 602.

rogation thereof; and in the caſe of *Brown v. Jones* (4), where the portion which was given to the huſband by the wife's brother was paid three months before the ſettlement was executed, but in the receipt given to the brother, the intention of making a ſettlement was expreſſed, though it was objected that this was only recital, the court held that there was a good conſideration to ſupport the ſettlement when afterwards made. And it was obſerved by Lord Hardwicke, that a conſideration executed was as good to ſupport a ſettlement as it was to ſupport an *aſſumpſit* at law (*a*). But we muſt remember, that if ſuch ſettlement after marriage reſt only in covenant and articles, equity will decree performance only againſt the party himſelf, his repreſenta-

(4) 1 Atk: 188.

(*a*) There may be, perhaps, ſome danger in reaſoning analogically from the principles on which conſiderations either to raiſe *aſſumpſits* or uſes at common law are grounded, to the nature of the conſideration required by theſe ſtatutes of Eliz. They ſtand on a different foot as to their final object, which, in the one caſe, is to manifeſt the *verity*, in the other, the *purity* of intention in the donor or contractor.

tives, thoſe claiming under him with notice, or without conſideration, and the general creditors, and not againſt *bona fide* purchaſers and incumbrancers (5). From the report of *Dundaſs* v. *Dutens*, the facts of the caſe can only be obſcurely collected; but it ſhould ſeem that, if the ſettlement was made while the bequeſts of the will in favour of the wife remained ſubject to the legal right of the executors, this ſettlement of her intereſt was no more than the court of Chancery would have inſiſted upon, if a bill had been brought by the huſband to compel payment by the executors, according to the doctrine in *Jewſon* v. *Moulſon* (6), as propounded by Lord Hardwicke; and in this view the caſe ſeems to fall within the principle of *Moor* v. *Rycault* (7), where a huſband, who had made no proviſion for his wife, agreed that her fortune, which was in the hands of truſtees, ſhould be laid out in the purchaſe of lands; this agreement, though *after* marriage, the court would not conſider as voluntary, ſo as to poſtpone it to the claim of the huſband's creditor.

(5) Vid. 2 Vez. 309. and *Trevor* v. *Trevor*, 1 P. Wms. 622.

(6) 2 Atk. 417, and the caſes there cited.

(7) Prec. in Chan. 22.

We obſerve, that, in the above-mentioned caſe of *Dundaſs* v. *Dutens*, the ſtatute of frauds was urged at the bar, as an anſwer to the importance aſcribed to the recital, which the ſettlement contained, of a pre-exiſtent parol agreement for the ſubſequent ſettlement; but that the court did not allow that argument to alter its opinion, which was in favour of the validity of the ſettlement. Indeed the caſes ſeem clearly to have ſettled that proof of a parol (8) agreement before marriage will ſupport the ſubſequent ſettlement by which it is followed up, againſt the claims of creditors or purchaſers. But as it cannot be denied that ſuch parol agreements are within the ſtatute of frauds 29 Car. 2. the inference is, that the conſideration for theſe ſettlements after marriage, drawn from the exiſtence of prior agreements, does not depend upon any legal obligation to the performance of them. The above-mentioned ſtatute of Car. 2. has ſunk the legal remedies upon ſuch parol agreements; yet, though no proof can be admitted to give to them a ſubſtantive validity, there

(8) Vid. Str. 237.

are many inſtances both at law and in equity of their influence on the conſtruction and efficacy of written agreements (9); and in this ſubſidiary light they have always imparted ſtrength to ſettlements after marriage, where the thing agreed to be done, and the thing performed, exhibit ſo plain a correſpondence as to unite them in a derivation from the ſame original motive. Upon a ſimilar principle it was agreed in the caſe of *Lavender* v. *Blackſtone* above cited, that a promiſe made by an *infant* on his marriage to ſettle his eſtate when of age, was a ſufficient conſideration to ſupport the ſettlement after marriage made in purſuance of ſuch promiſe, although by law the infant was not compellable to fulfil the ſame (*b*).

(9) 2 Vez. 375. *Pitcairne* v. *Ogbourne.*

(*b*) And it ſeems, that where a feme infant, ſeized in fee, covenants with the conſent of her guardians, in conſideration of a ſettlement, to convey her inheritance to her intended huſband, if this be done in conſideration of a competent proviſion, Equity will execute the agreement, though no action would lie at law to recover damages. 2 P. Wms. 243. *Cannel* v. *Buckle*, and ſee the caſes cited in Mr. Coxe's note.

SECTION VI.

It ſeems, however, that a ſettlement *after* marriage, can derive no validity from ſuch agreement *before* marriage (whether ſuch agreement be by writing or parol) unleſs there be ſuch a conformity (1) between the thing done, and the thing promiſed, as imports a veritable intention of performance. It is, indeed, ſometimes the practice to inſert in marriage articles, a clauſe, authoriſing a deviation therefrom in the future ſettlement; yet ſuch controul being committed to thoſe whoſe intereſt ariſes from the articles, the exercife of it is ſtill founded upon the articles, notwithſtanding the variation it introduces, and participates in the marriage conſideration. In ſuch a caſe alſo, it may be obſerved, that the articles, in placing the parties in a ſituation to contract with each other, by making their mutual conſent neceſſary, potentially provide for the renewal of a conſideration to give value and vali-

(1) Ambl. 288.

dity to freſh arrangements. But when without any ſuch proviſion the ſettlement *ſubſtantially* varies from the agreement made on the treaty of marriage, it is plain that it cannot be incorporated with it ſo as to draw any virtue from the marriage conſideration: Thus in the caſe of *Lavender* v. *Blackſtone* ſo frequently cited, the promiſe by the intended huſband made upon the marriage treaty being to ſettle his eſtate upon himſelf and iſſue, and the ſettlement being only of the reſidue of the money to ariſe from the ſale of the eſtate, which was veſted in truſtees for raiſing a ſufficient ſum to ſatisfy ſubſiſting and future debts; this was conſidered as ſo ſubſtantial a variation as wholly to diſconnect the promiſe and the ſettlement, and to leave the latter entirely without ſupport from the conſideration of the former.

In the caſe, before cited, of *Griffin* v. *Stanhope* (2), though the leaſe was not ſpecifically in the contemplation of the marrying perſons at the time when the promiſe was made, yet, as the general intention

(2) Cro. Jac. 454.

intention of the parties to the contract was effectuated by the leaſe, it was conſidered as grounded on a ſufficient conſideration. And a liberal regard to the general ſpirit and meaning of the agreement before marriage ſeems to have prevailed as to this point in the courts both of Equity and Law. Thus, though it ſeems to have been conſidered in the caſe of *Jaſon* v. *Jervis* (3), that if a bond before marriage be only for a *jointure*, and the ſettlement goes further, and entails the land upon the children of the marriage, the ſettlement may be good as to the jointure, and fraudulent as to the remainder in reſpect to a purchaſer: there being no room for any latitude of conſtruction where the ſtipulation ſo expreſsly bounds itſelf to the intereſt of the wife. Yet where (4) the intended huſband was under age, and ſo incapable of making a ſettlement, and the wife's father gave a bond for the payment of 1,500*l.* on his making a *ſuitable jointure ſettlement*; here, though the huſband ſome years after, on payment of the 1,500*l.* made a ſettlement of 147*l.*

(3) 1 Vern. 285.

(4) Prec. in Chan. 520.

to the ſettlement of an eſtate, in which the father and ſon have ſeveral intereſts, their mutual conceſſion and accommodation may be of itſelf the ſource from which all the limitations of ſuch ſettlement deduce a valuable ſupport againſt a ſubſequent purchaſer. This doctrine was clearly recognized and relied on by Lord Hardwicke in the caſe before mentioned of *Ruſſel et al.* v. *Hammond* (1), wherein the Chancellor obſerves, that he was ſpared the neceſſity of entering into any nice enquiry into the queſtion, whether a voluntary ſettlement be fraudulent or not, becauſe, as to the Ford eſtate, there was a valuable conſideration on the face of the ſettlement, for the father was tenant for life, and the ſon entitled to the remainder in tail. And where a father and his ſon join in a family ſettlement, it is a bargain for a good and valuable conſideration, and has been ſo held in ſeveral caſes. In the caſe then under diſcuſſion, his Lordſhip obſerved, that the ſon could not have ſettled the reſiduary intereſt without the father's help, becauſe he was tenant in tail in remainder, and not in poſſeſſion. But if

(1) 1 Atk. 16. Lord Hardwicke is made by the Reporter to ſpeak of the Ford eſtate, which appears to have been leaſehold. But his obſervation applies rather to freehold property. And this application of it to the Ford eſtate does not occur in the Regiſter's book.

if the father had been tenant for life, and the ſon tenant in fee, and they had joined in ſuch ſettlement, it would have made a material difference, for then, his Lordſhip ſaid, he ſhould have thought the ſettlement bad, for, under ſuch circumſtances there could have been no occaſion for the father's joining, as the ſon might have diſpoſed of the reſiduary intereſt without him.

SECTION VIII.

A PORTION given to the huſband by the friends of the wife is a valuable conſideration for the limitations of a ſettlement after marriage in favour of the wife and the iſſue (1). Thus in *Colvile* v. *Parker* before cited (2), where a huſband voluntarily aſſigned a leaſe for years by way of jointure for his wife, and took the profits, and afterwards ſold it to another, it was held to be within the ſtatute, becauſe it was a voluntary conveyance, and ſhould be intended fraudulent from the beginning. But it was agreed, that if at the time of the marriage or *afterwards*, by reaſon of a portion given by his wife's friends in recompence thereof, and for a proviſion in favour of his wife, he had made an aſſignment of ſuch leaſe to his wife's friends, and had afterwards taken the profits thereof, and then had ſold the term, ſuch a tranſaction would not have been within the ſtatute.

(1) 2 Vez. 28. Ambl. 121. per Ld. Hardw.

(2) Cro. Jac. 158.

And

And (3) where the huſband, in conſideration of an additional portion of 100 *l.* paid by the wife's mother, ſettled an eſtate of 100 *l. per ann.* upon himſelf for life, remainder to his firſt and other ſons, &c. and thirteen years after mortgaged his eſtate with the uſual covenants; and, upon his death, the mortgagee brought his bill againſt the ſon to foreclose. Lord Talbot ſaid it would be very hard to call this a fraudulent ſettlement; ſince it was in conſideration of a marriage had, and of an *additional proviſion of* 100l. *paid by the wife's relations*, which cannot be ſaid to be voluntary againſt a mortgagee, who lent his money thirteen years afterwards.

(3) Ca. Temp. Talbot, 64.

Again in the caſe of *Ruſſel* v. *Hammond*, before cited, a portion paid after marriage was called by Lord Chancellor Hardwicke a good pecuniary conſideration (*a*).

Brown

(*a*) In *White* v. *Thornborough*, Prec. in Chan. 425. Gilb. Eq. 107. where the huſband, in conſideration of a portion paid after marriage, articled to ſettle his eſtates to the uſe of himſelf for life, remainder to the uſe of Mary his wife for life, remainder to the heirs of his

(4) 1 Atk. 188.

Brown v. *Jones* (4) is alſo a caſe of ſimilar import, which was ſhortly thus: A. being ſeized of an eſtate in fee, married B. but, receiving no more than 150 *l.* with his wife, made no ſettlement upon her at

---

his body on the body of the ſaid Mary begotten, with remainder to his own right heirs, the court of Chancery paid ſuch regard to the portion as to ſupport the claims of the female iſſue of the marriage againſt the creditors of the ſon, which creditors had obtained the *legal* eſtate under a deviſe by the ſon upon whom it had *deſcended* before his death; and this, though the daughter, to whom no intereſt was given by the literal import of the articles, could only claim on the ground, that if a bill had been brought to have them carried into execution the ſettlement would have been directed to have been made, with a remainder to the daughters and the heirs of their bodies, or with a remainder to the heirs of the body of the father. It ſhould be obſerved, that the nature of the portion paid in this caſe of *White* v. *Thornborough*, (it being her orphanage part by the cuſtom of the city of London,) diſtinguiſhes it from the caſes in the text. It has hitherto been cited only for the illuſtration of collateral points; but it will be more appropriately arranged, in a future part of the body of the work, among the caſes where the ſettlement after marriage derives its value, not from an original donation of the wife's friends, but from the peculiar predicament of the wife's property. Yet it enforces the doctrine under preſent conſideration by reaſons *a fortiori*.

the

the time of the marriage. But afterwards in a treaty with C. his wife's brother, the brother agreed to give his ſiſter 1000 *l.*; 600 *l.* of which was paid on the 24th of June 1732; and a receipt was taken from A. the huſband, declaring himſelf to have received of his brother the ſaid 600 *l.* in conſideration of the ſettlement to be made on his wife. The ſettlement was executed on the 8th of Auguſt following; which ſettlement was recited to be in conſideration of a marriage already had, and the ſum of 1006 *l.* paid as a marriage portion by C. to A. and for ſettling a jointure; and the eſtate of A. was thereby conveyed to truſtees to the uſe of the huſband for life; remainder to the truſtees to preſerve contingent remainders, remainder to the wife for life, for her jointure, and after the deaths of huſband and wife to the uſe of the truſtees for the term of ninety-nine years, upon ſuch truſts as ſhould be thereinafter expreſſed, and after the determination of that eſtate to the firſt and other ſons of the marriage in tail male. There was no declaration of the truſts of the term of ninety-nine years, nor any receipt indorſed

indorſed on the back of the ſettlement: and the huſband becoming bankrupt, the bill was brought by the aſſignees to have this ſettled eſtate ſold. And among other things it was contended, that the truſt of the term for want of a declaration, reverted to the huſband for the benefit of his creditors.

The Chancellor made two queſtions, firſt, whether the deed was valid againſt creditors; ſecondly, whether, if valid, the creditors could claim any benefit under the ſettlement, as being entitled to have the truſt of the term conſtrued as reſulting to the huſband for their benefit. His Lordſhip was clearly of opinion as to the firſt queſtion, that the ſettlement could not be impeached, being grounded on a valuable conſideration. And on the ſecond point his Lordſhip held that it was involved in the determination of the firſt; for if the deed had been *voluntary*, the conſtruction demanded by the creditors ought to have been made, but as it was *valuable* it muſt be regarded as a contract for the wife's jointure, and

alſo for the benefit of the iſſue. If the huſband had been the plaintiff in the cauſe, the court would have conſidered the term as a truſt-term only to attend the inheritance according to the limitations in the ſettlement (*b*); and the aſſignee could be in no better condition than the bankrupt.

And in the caſe of *Stileman* v. *Aſhdown* (5), a ſettlement after marriage, containing a recital of a portion paid, and being long anteriour to the claim ſet up by the judgment creditor in that caſe, was not ſuffered to be impeached by ſuch claimant; for the Chancellor obſerved that, though the ſettlement was made after marriage, yet being in conſideration of a portion *which, for any thing that appeared, was*

(5) 2 Atk. 477.

(*b*) Vid. the caſe of *Uvedale* v. *Halfpenny*, 2 P. Wms. 151. where the truſtees to preſerve contingent remainders, having been placed in a ſettlement after a limitation of an eſtate tail to the firſt and other ſons, the ſettlement was decreed to be rectified without any evidence of intention in the parties as to the placing of the limitation; and ſee 1 P. Wms. 234. 2 Vez. 194. 333. 1 Atk. 419.

paid at the time, it was not liable to be overturned by ſubſequent creditors. Nor can it be objected to the claims of the iſſue, under ſuch a ſettlement after marriage, that the portion agreed to be paid was in fact unpaid; for, if a huſband ſettles his eſtate upon his iſſue, in conſideration of a portion to be paid by the friends of his wife, it is not the recompence but the inducement which imparts value to ſuch family proviſion, ſince the fraudulent intent within the ſtatutes is as much diſproved by a moral certainty of the expectation, as by the actual receipt of an equivalent.

(6) 1 Ves. 309.

Thus (6), according to the report of *Ramſden* v. *Hylton*, or *Hylton* v. *Biſcoe*, Lord Hardwicke ſeems to treat the queſtion whether the portion agreed to be paid was actually paid, as immaterial to the title of the iſſue; though it is not very eaſy to comprehend the force of the reaſon with which that poſition is there ſupported, viz. "that the iſſue of the marriage take from both parties, ſo that whether they

they perform their agreement among themſelves may be immaterial to the iſſue."[a] In looking into ſuch caſes for the features of a contract, to carry to the limitees under the ſettlement the ſupport of a valuable conſideration, we muſt find ſomebody to inveſt with the character of a purchaſer, from whom the conſideration may move; and ſomebody in whom the intereſt reſides, and from whom the limitations or proviſions may be purchaſed by the conſideration. Thus, where a huſband, in conſideration of a portion from the friends of his wife, ſettles all, or a part of his own eſtate, ſo as to make proviſion thereout for his wife and iſſue, the wife and her friends are properly the purchaſers, or, to ſpeak with more latitude, the iſſue are purchaſers under the maternal anceſtors, from their father, and not, as it ſhould ſeem, (with reverence to the great authority above-mentioned), under *both* parents, who cannot devolve upon the iſſue the character of purchaſer from both, unleſs they have both an intereſt in the ſame property, ſo as to be enabled to

deal reciprocally with each other, in meaſuring out the diſpoſitions of it among their poſterity.

It ſeems hardly reconcilable with reaſon to talk of purchaſers, in that ſenſe of the word with which we are concerned at preſent, without adverting to a tranſaction which will bear out the inference of a conſtructive contract in favour of ſuch *purchaſers*, a name extended to thoſe who, though not original parties to the contract, are primarily or derivatively within the proſpect of the ſuppoſed ſtipulations. It was, therefore, aſked, by way of objection at the bar, in the caſe of the *Earl of Coventry* (*c*), (where tenant for life with power to make a jointure, remainder over, covenanted to make a jointure to a wife, in conſideration of marriage, by virtue of his power, and died before making the

(*c*) According to Fitz-Gibbon, 211. where the caſe is cited. The caſe is reported in 9 Mod. 12. 1 Str. 596. 2 P. Wms. 222. and very fully at the end of Maxims in Equity.

jointure,

jointure, and the court was applied to for a compulsory execution of the covenant, in favour of the widow, by the remainder-man,) from whom could the wife be a purchaser? to which it was replied; from the owner of the inheritance who gave the power.

SECTION IX.

BUT it is not always neceſſary that *third* perſons ſhould intervene to qualify theſe ſettlements after marriage, to ſtand, as againſt purchaſers for valuable conſideration. A wife, having a preſent proviſion by ſettlement before marriage, is in a capacity to become a purchaſer from her huſband, by the ſurrender of ſuch exiſting intereſt, of a freſh and even ampler proviſion for herſelf, and more extended and beneficial limitations to the iſſue of the marriage. And, where ſuch ſurrender of the wife's intereſt is made by the reabſorption of the jointure into the maſs of property out of which the new limitations are to ariſe, the above-mentioned remark of Lord Hardwicke ſeems properly applicable, ſince, in ſuch a caſe, there is ground for regarding the iſſue as purchaſers under *both* their parents, who to this purpoſe are joint contributors.

In

In the caſe, indeed, of *Scott* v. *Bell* (1), where the wife joined in the *total alienation* of her jointure, ſhe only could be conſidered as the purchaſer of the new limitations, which came out of another eſtate of the huſband. That caſe was thus :

(1) 2 Lev. 70.

R. B. upon his marriage with M. C. ſettled the manors of Brandon, Brooking, and Bardolff farm, to the uſe of himſelf for life, remainder to the wife for her jointure, remainder to their firſt and other ſons in tail, remainder to his own right heirs, and the manor of Baupre to the uſe of him and his heirs. R. B. afterwards, he being then indebted to the amount of 4000 *l.* and having no iſſue, was joined by his wife in a fine, whereby the jointure lands were ſold for payment of his debts. And the ſame day he covenanted to ſtand ſeized of the manor of Baupre to the ſame uſes as the manor of Brandon, &c. were before ſettled. The debts were paid, and about fifteen or ſixteen years after, R. B. contracted new debts, for which H. became bound with him, and for the ſecurity of the ſaid H.,

he made a leaſe to him for one thouſand years of the ſaid manor of Baupre. H. was forced to pay ſeveral of the debts, and by virtue of the ſaid leaſe for one thouſand years, demiſed to the plaintiff, who brought ejectment.

The queſtion was, whether, as againſt the leaſe, the ſettlement after the marriage of the manor of Baupre, was fraudulent or not under the ſtatute 27 Eliz. It was objected, firſt, that there were no articles or agreement precedent to the ſecond ſettlement, to ſhew that the wife's joining in the fine for the ſale of her jointure, was the conſideration for making that ſettlement, and ſo the fine and ſale of the jointure and the ſubſequent ſettlement having no apparent mutual connection, the latter muſt be conſidered as altogether voluntary. Secondly, it was objected, that the huſband without the wife might have deſtroyed the contingent limitations to the ſons, no ſon being then born, and no meſne remainder having been limited to preſerve them, ſo that the conſideration could not be pretended to cover theſe eſtates to the ſons, which

which muſt be therefore conſidered as merely voluntary.

But by Hale C. J. and the court the ſettlement was adjudged not void as to the leaſe. And it was ſaid, that, the old ſettlement being deſtroyed, and the new one made the *ſame* day, *an agreement by the huſband to make the new ſettlement*, in conſideration that the wife would paſs the fine and bar the old ſettlement, ſhould be intended, and that the conſideration ſhould extend to all the limitations of the new ſetttlement: for that it ſhould not be preſumed that the wife would have parted with her eſtate by the old ſettlement, unleſs the baron would make the ſame proviſion for her and her iſſue by the new; and though, it was true, *he* might have deſtroyed the limitations to ſons without *his wife*'s concurrence, yet that *that point* was not ſo well known at the time when the ſettlement in queſtion was made, and nobody would then have purchaſed under R. B. if *his wife* had not joined. And, notwithſtanding the lands in the new ſettlement were almoſt double the value of thoſe

thoſe in the firſt ſettlement, yet the jury were directed to find for the defendant, who was the ſon of R. B. by M. C. his wife, the father being dead.

The caſe, therefore, of *Scott* v. *Bell* has decided that a jointured wife, may, by renouncing her preſent proviſion, become a purchaſer, for valuable conſideration, from her huſband of an ampler proviſion for herſelf; and if the ſame act, by her concurrence in which ſhe thus abdicates her own title, involves the deſtruction of the limitations deſigned as a proviſion for the iſſue of the marriage, ſuch concurrence will ſupport a freſh ſettlement of other property of the huſband upon the iſſue of the marriage, to a more beneficial extent than the former ſettlement had been carried. And though no precedent *agreement* be ſhewn, to prove the mutual relation of theſe tranſactions, yet if the ſacrifice and retribution have a clear reſpect to each other, both as to time and circumſtances, their reciprocity of conſideration will be preſumed by the courts. In the above-mentioned caſe of *Scott* v. *Bell*,

Bell, the act of retribution being immediately conſecutive to the act whereby the firſt ſettlement was defeated, and being, at leaſt to the extent of the proviſions in the firſt ſettlement, an act of natural juſtice and parental duty, the faireſt reaſon preſented itſelf for referring the whole to one contract. It is true, the proviſions of the *ſecond* ſettlement were greatly more bountiful than thoſe of the firſt; but, as was ſaid by Lord Talbot in the caſe of *Jones* v. *Marſh*, there is *room* for *bounty* in theſe family ſettlements. We obſerve, however, that, in *Scott* v. *Bell*, though the proviſions of the two ſettlements varied in magnitude, the *ſame perſons* were the objects of both; and undoubtedly, where the objects are the ſame, we more eaſily unite the deprivation and reſtitution within the terms of the ſame ſuppoſed bargain.

It ſeems, too, that where the wife concurs in defeating the proviſions of a marriage ſettlement for herſelf and the ſons or daughters of the marriage, a *ſecond* ſettlement may comprize limitations to children *unprovided for* by the *firſt*, ſo as to

to impart to them the ſupport of a valuable conſideration, if the unſettling inſtrument be expreſsly ſtated to be the conſideration for theſe ſuperadded limitations. The caſe of *Ball* v. *Burnford* (2) is an authority for this poſition: which caſe was thus: E. A. being tenant for life of lands, with remainder, as to part, to his wife, for her life, for her jointure, remainder to the heirs male of their two bodies, acknowledged a judgment to the plaintiff, and then entered into covenants with J. S. that he and his wife would join in a fine, which ſhould be in the firſt place to the uſe of J. S. and his heirs, by way of mortgage for ſecuring a ſum of money, then to the huſband for life, then to the wife for life for her jointure, then to the ſons of the huſband and wife in tail, *then to the daughters in tail.* And a fine was levied accordingly. There were other incumbrances upon the eſtate, prior to the firſt ſettlement, which J. S. the mortgagee, or the defendant Burnford (for whom he was a truſtee) purchaſed in. E. A. died without iſſue male, leaving daughters of the marriage, who were alſo defendants.

(2) Prec. in Chan. 113.

The

The plaintiff brought his bill to be let into the benefit of his judgment, paying the mortgagee what he really had paid; for that by the fine the estate tail was barred, and the judgment let in, and that this settlement as to the daughters was voluntary. It was admitted that the fine had barred the estate tail created by the first settlement, but it was insisted that the daughters were purchasers by the mother's joining to bar her jointure; and that *that* consideration did extend to the estate of her daughters as well as her own. But the Lord Keeper was of opinion, that, though this *might* have been made a good consideration for *both*; yet, as it was not expressed in the deed that the mother's concurrence in barring the jointure was to be any consideration for settling the estate upon the daughters, the estate of the daughters must be taken to be voluntary, and therefore a judgment creditor ought to have the assistance of the court before the daughters.

With respect to this case, we observe, that, if there had been no outstanding legal

legal eſtates, ſo that the creditor might have had the benefit of his judgment at law, it is evident that by the fine he would have been let in upon all the intereſts under the new ſettlement; and that, as againſt the mortgagee himſelf there was no equity to oppoſe his application for liberty to redeem; but, as it *was neceſſary* to go into equity for aſſiſtance, by reaſon of the outſtanding terms, the court would not have afforded its aid, in derogation of the limitations to the daughters under the ſettlement, if, by fair conſtruction, thoſe limitations could have been brought within the ſcope of the valuable conſideration.

Where the huſband is joined by his wife in levying a fine of the wife's inheritance, to family uſes or truſts, and a ſeparate intereſt is given to the wife, or any eſtates are created which trench upon the derivative freehold of the huſband, it ſeems, upon a general principle of reaſoning, that the proviſions of a ſettlement reſting upon ſuch inferred contract,

tract (*a*), are unimpeachable by ſubſequent purchaſers. For the huſband and wife ſeem both to be capable, in ſuch a caſe, of being reſpectively conſidered as valuable purchaſers of the ſeveral intereſts ariſing from ſuch a tranſaction. The wife has ſubſtantially purchaſed her ſeparate intereſt or eſtate, during the huſband's life, out of his marital freehold, and the huſband has given a valuable conſideration to qualify him as a purchaſer of the proviſions for their common children out of the mother's inheritance.

But where, under the ſame circumſtances, the limitations or proviſions of the ſettlement, grounded on ſuch fine, *integrally* reſtore the huſband's former intereſt in the wife's property, or ſo nearly reſtore it, as to reduce the conſideration

(*a*) Though the wife cannot *legally* contract with her huſband, ſo as that the contract itſelf can be ſaid to ſtand upon a *legal* conſideration, (for the huſband and wife are one in law), yet they are ſo far *morally* capable of contracting with each other, as that ſuch contract may be a perfect conſideration for their ſubſequent acts.

to a colourable minuteneſs, ſo that his mere concurrence in the fine is the only meritorious act on his part, it ſeems *doubtful* at *leaſt*, whether this ſimple tranſaction furniſhes a valuable conſideration for the ſettlement of the wife's property, ſo as to protect it againſt a valuable purchaſer from the wife after the death of the huſband. The caſe firſt put, wherein the huſband was ſuppoſed to make a ſacrifice of a portion of his marital intereſt; may, perhaps, be ſaid to fall within the principle of Lord Hardwicke's doctrine in *Ruſſel* v. *Hammond* (3), before noticed, viz. that where a father, tenant for life, and the ſon remainder-man in tail, join in a ſettlement after the marriage of the ſon, it is a bargain for a good and valuable conſideration; ſince the father's concurrence was *neceſſary*: but his Lordſhip made it appear, in a ſubſequent part of that caſe, that he did not annex the idea of a valuable conſideration merely to the father's *concurrence*, but that he ſuppoſed, at the ſame time, a relinquiſhment by him of all or part of his precedent par-

(3) 1 Atk. 16.

ticular eſtate; for it was, afterwards, obſerved by his Lordſhip, that "there was a plain badge of fraud in the ſettlement of another eſtate, which was alſo in diſpute in that caſe, ſince the father took back an annuity to himſelf which was probably the full value of the eſtate comprized in the deed; and therefore parted with nothing to the ſon, ſo that it was almoſt tantamount to a continuance in poſſeſſion, which was always deemed a ſtrong circumſtance of fraud." The Chancellor's obſervation ſeems applicable in principle to the caſe of *Goodright* v. *Moſes* (4), cited and enlarged upon in a former part of this eſſay, where a fine was levied of an eſtate in remainder of Elizabeth Harris the wife, in which J. R., her father, and tenant for life, and Thomas, her huſband, joined, but the uſes of which fine gave back to J. R. and the huſband the ſame quantities of intereſt which belonged to them before the fine was levied, ſo that there was nothing in that caſe to ſupport the ſettlement on the children of Thomas and Elizabeth, but the bare concurrence of the parties to the aſſurance, and the court accordingly

(4) 2 Blackſtone, 1019.

cordingly adjudged the ſettlements void againſt a valuable purchaſer from Elizabeth after the death of J. R. and Thomas; and it may be obſerved, by the way, that this caſe of *Goodright* v. *Moſes* muſt be regarded as one of the ſtrongeſt in the books upon the ſtatute 27th Eliz. ſince there the ſtatutory preſumption of fraudulent intent from the want of valuable conſideration in the ſettlement, was allowed to be ſo prevailing, as to connect in continuity of purpoſe the voluntary act and the ſubſequent valuable conveyance, notwithſtanding the ſuſpence of the huſband's life was interpoſed between the deſign and the accompliſhment.

Whether any and what degree of value is derived from the concurrence of a married woman in a fine to bar herſelf of dower out of her huſband's lands, are points as it ſhould ſeem of ſome ambiguity. In *Lavender* v. *Blackſtone* (5) before cited, it was ſaid by the court, that "as the wife did not join in the fine which was levied by the huſband of his eſtate tail, ſhe continued dowable; but if ſhe

(5) 2 Lev. 146.

ſhe *had* joined, it might have made the ſettlement to be upon good conſideration, which, otherwiſe, was merely voluntary."

It appears, on the peruſal of that caſe, that if the wife had joined in the fine to bar herſelf of dower, the ſacrifice on her part would by no means have been unſubſtantial, ſince no *certain* proviſion was ſubſtituted, by the deed, in lieu of her claim of dower, and the proviſion, uncertain as it was, (being dependent on a mere power of jointuring), was, moreover, poſtponed to the payment of the huſband's debts. Although there does not appear any ſubſequent authority to ſupport the above opinion thrown out in the caſe of *Lavender* v. *Blackſtone*, yet the principle on which it ſtands ſeems to be fortified by the general reaſoning of the caſes upon the ſtatute 27 Eliz. But in a ſubſequent caſe, determined in the court of Chancery (6), where a huſband having mortgaged his land, and the wife having joined in levying a fine of the ſame, for the purpoſe of barring her right of dower, the huſband, in conſideration thereof, had

(6) *Dolin* v. *Coltman*, 1 Vern. 294.

agreed that his wife ſhould have the whole equity of redemption in lieu of her dower, and afterwards twice mortgaged the ſame land, the court declared the agreement to be fraudulent againſt the ſubſequent mortgagees; but ſince in confidence of this agreement ſhe had joined in the fine, and thereby barred her dower, the decree allowed her to enjoy her dower in caſe ſhe ſurvived her huſband. In the caſe of *Scott* v. *Bell* (7) before cited, the concurrence of the wife in the deed, by which her jointure was aliened, was held a valuable conſideration for the ſettlement; and it ſeems reaſonable to preſume, that if the wife in that caſe had joined in the fine for the purpoſe only of barring her dower, inſtead of parting with her jointure intereſt in the manor of Black-acre; and in conſideration of her joining for ſuch purpoſe, the huſband had limited a life eſtate to her in his lands at White-acre, ſuch eſtate would have been good and ſupportable againſt creditors or ſubſequent purchaſers for valuable conſideration. But it ſeems very reaſonable, where a married woman joins in a fine for

(7) 2 Lev. 70. et vid. ſupra 263.

for barring her dower, from which fine no perſonal advantage accrues to the huſband, but the benefit of which redounds to the wife by means of a family ſettlement grounded thereupon, compriſing a jointure, or a proviſion in the nature of a jointure, exceeding her dower in value, to hold this a voluntary ſettlement by the huſband, ſince he receives, in ſuch a caſe, no veritable conſideration for what he beſtows, the diſpoſitions in favour of his children, if any, not depending upon his wife's concurrence, and the augmented proviſion for herſelf ſtanding in no danger of want of confirmation by her elective preference after the huſband's death. Accordingly, in a late caſe (8) before cited, the counſel for the plaintiff, claiming under the purchaſer, inſiſted upon the effect of the fine, on which the voluntary ſettlement was grounded, and in which the huſband and wife had joined, as barring the wife of her dower, without raiſing any ſurmize of valuable conſideration as ariſing from her concurrence.

(8) *Evelyn v. Templar*, 2 Bro. C. C. 148. et vid. ſupra 214.

SECTION X.

SUCH ſeems to have been the underſtanding of the courts in caſes wherein the huſband and wife have been the only parties in this preſumptive bargain, out of which the conſideration is drawn for the ſupport of the ſettlement. But the tutelary interference of the court of Chancery, where the property of the wife is in the cuſtody of that court, or in the hands of truſtees, has ſupplied another ſort of valuable conſideration, by which ſettlements after marriage may be ſupported. It has been very long (1) the practice of that court, whenever a huſband is obliged to have recourſe to its juriſdiction, in order to gain poſſeſſion of his wife's fortune, to ſee that a ſuitable proviſion is made for the wife, before it ſtirs a ſtep to aſſiſt the huſband (*a*). Nor is the rule affected by the

(1) Vid. the caſe of *Jewſon* v. *Moulſon*, 2 Atk. 420.

(*a*) There would be no end of citing caſes wherein this rule has been recognized and acted upon. References

the diverſity of predicament, in which a married woman's fortune may be placed; the

ferences to moſt of them may be found in the following places: 4 Vin. 199. et ſeq. 1 Bac. Abr. laſted. 481. the editor's note. 1 P. Wms. 383. Mr. Coxe's note. 1 Eq. Ca. Abr. 64. 3 P. Wms. 305. And ſee where Lord King expreſſed ſome diſapprobation of the rule, but ſubmitted to the practice; and, with a ſeeming inconſiſtency declared he would not condemn a man to pay coſts for inſiſting upon a right which the law gives him, whereby the coſts were thrown upon the executor, who withheld the wife's legacy, for a conduct which, by the Chancellor's admiſſion, the court had always approved of. In the late caſe of *Ball* v. *Montgomery*, 2 Vez. Jun. 191. the court ſeemed to touch the extreme limit of the rule, where there was a ſettlement, on marriage, of ſtock belonging to the wife, in truſt, after the death of the wife, for the huſband for life; if no iſſue the whole to reveſt in the wife, with a general power to her of appointment; and in default thereof to her next of kin; without any diſpoſition of the intereſt and dividends during the lives of huſband and wife. The wife eloped, and lived in open adultery; and a bill was brought by the huſband againſt the wife and truſtees claiming the intereſt and dividends during their joint lives. The huſband inſiſted that it was a mere omiſſion in not giving him the intereſt and dividends during his life. The wife contended that the omiſſion lay in not creating a truſt as to thoſe dividends for the ſeparate uſe of the wife. The Lord Chancellor conſidering that this was a fund for their *common* proviſion, and that, as they

the ground of the court's interference exiſts only in the *neceſſity* of obtaining its aſſiſtance, without regard to the circumſtances which induce the application. And it ſeems to be eſtabliſhed that a ſettlement after marriage *ſo enforced* is to be regarded as ſtanding on the ſame foundation as a ſettlement made by the huſband in conſideration of a portion given after marriage by the friends of the wife.

And the court of Chancery will not only protect ſettlements after marriage made under its own immediate authority and inſpection; but where the truſtee of a married woman, before he gives up the truſt property, ſtipulates with the huſband for a ſettlement, compriſing a reaſonable proviſion for the wife, and diſpoſitions for the benefit of the iſſue of the marriage, ſuch ſettlement will have the ſanction of

---

were *de facto* ſeparated, that intention would be clearly defeated by giving the huſband the *whole*, and thinking the caſe very diſtinguiſhable from that of an *expreſs* gift to the huſband, would not decree for the huſband *or* wife, but ordered the dividends in future to be paid into court till further order, that the parties might thus be *forced* into ſome agreement for the wife's ſupport.

that

that court, and the ſupport of a conſtructive valuable conſideration. The rule, however, has not extended ſo far in favour of the wife as to compel a reſtitution where the truſtee has *voluntarily* reſigned her fortune to the huſband (2), for her perſonal eſtate belongs to the huſband, and the court can only withhold it as a cautionary pledge, from which it derives a power of impoſing conditions upon the huſband for the benefit of the wife. The court of Chancery refuſes in ſuch caſes, where the money is not paid, implicitly to follow the law; but it will not enforce a reſtitution of what has been *legally* obtained (3). Neither, as it ſeems, will it interfere to reſtrain a truſtee from paying it to the huſband. But if the truſtee, before he pays to the huſband the property or portion of the wife, inſiſts upon a reaſonable proviſion for the wife, he has only done *that* which the court would have done, had the money been in the hands of a maſter, or had a bill been brought againſt the truſtee to compel payment; ſo that the truſtee, being in a ſituation to compel payment to the huſband, was, alſo, in a

(2) Prec. in Chan. 414. but it ſeems that if a truſtee pays to the huſband after a bill filed, and, particularly, after a decree for a propoſal, the court will conſider it a payment by wrong, and ſet it aſide. vid. 4 Vez. Jun 18.

(3) Vid. 2 P. Wms. 639. 3 P. Wms. 11. 1 Vez. 539. 2 Atk. 67. 2 Atk. 420.

ſituation to raiſe a valuable conſideration for ſuch ſettlement though made after marriage. Thus, where J. S. having run away with a young woman (4), who had a conſiderable portion in the hands of her truſtees, and being unable to obtain poſſeſſion of her fortune without giving ſecurity to the truſtees, that it ſhould be ſettled for the benefit of the wife; agreed accordingly, that it ſhould be laid out in land to be ſettled to the uſe of the huſband and wife, and the heirs of their bodies; upon a bill's being filed by a creditor of the huſband, the court of Chancery would not conſider the agreement, though *after* marriage, as voluntary, declaring that if the huſband himſelf had exhibited a bill there againſt the truſtees for the portion, the court would not have decreed it to him without inſiſting upon ſome ſuch ſettlement, and the bill was accordingly diſmiſſed.

(4) Prec. in Chan. 22. *Moor* v. *Rycault*.

In another caſe (5) C. having clandeſtinely married the daughter of M. entitled to a moiety of 12,000 *l.* under her mother's marriage ſettlement, and the father of

(5) *Wheeler* v. *Caryl*, Ambl. 121.

of the young lady having ſecured 6,000 *l.* on his eſtate, made a ſettlement in conſequence thereof upon his wife. After the death of the father, the truſtees, ſeeing a ſettlement made, paid the money to the huſband; and the queſtion for the court was, whether ſuch ſettlement was voluntary and fraudulent, or good and valid againſt creditors. The rule laid down in this caſe by Lord Hardwicke was as follows: "If a young lady is entitled to a portion ſecured by a truſt term, which her huſband cannot lay hold of, and poſſeſs, without the aſſiſtance of this court, and, becauſe the truſtees refuſe to raiſe the portion, the huſband comes here for aid, the court will decree an adequate ſettlement to be made on the wife, and will ſupport it as a good ſettlement for valuable conſideration. But (ſaid his Lordſhip) the court has gone further; if the wife becomes entitled after marriage to ſuch a portion, which the huſband cannot touch without the aid of the court, and the truſtees will not pay it without the huſband's making a ſettlement, to which the huſband agrees, and does *that* which the court

court would decree, it is a good ſettlement againſt creditors." And no doubt can be entertained, but that it is equally good againſt purchaſers; for theſe caſes reſt upon the ſame principle as thoſe wherein the conſideration ariſes from an *original* gift to the huſband *after* marriage, by the friends of the wife; nor can it be queſtioned, but that the valuableneſs of this ſort of conſideration would be admitted in courts of law, as well as in the courts of equity, whence they derive their origin and force. We may add to theſe caſes the obſervation of Lord Hardwicke in *Brown* v. *Jones* (6). "If a woman, whoſe fortune is in the hands of her brother, marry indiſcretely, and the brother holds his hand, until the huſband makes a proviſion, it is *honeſtly* done, and is no more than what the court would have done, and the court will equally ſupport it, as if a bill had been brought againſt the huſband to compel him to make a proviſion for his wife."

(6) 1 Atk. 190.

But it ſhould ſeem, that, if the ſettlement by the huſband in a caſe circumſtanced

ſtanced like thoſe above mentioned, goes greatly beyond what the court would have enforced, it muſt be regarded as an unreaſonable ſettlement, and fraudulent, as to the exceſs, againſt the creditors of the huſband; ſuch ſuppoſition, at leaſt, ſeems warranted by what fell from Lord Hardwicke in the caſe (7) of *Ward* v. *Shallet* (*b*). (7) 2 Vez. 18.

The ſame practice of impoſing terms on the huſband has prevailed as well where a married woman is entitled to a legacy in the hands of an executor, as where her property conſiſts of money in the hands of

---

(*b*) There may, perhaps, be ſome doubt whether the equity of the wife can be ſatisfied with a proviſion of leſs amount than her *whole* fortune, where the court has to direct the ſettlement; vid. *Worral* v. *Marlow*, 1 P. Wms. 459. note; and *Like* v. *Beresford*, 3 Vez. Jun. 506.; but the valuable conſideration will, it ſhould ſeem, clearly ſupport it *up to* the full amount; and it ſeems a ſettled rule in equity not to conſider the huſband a purchaſer by a ſettlement after marriage to the extent of decreeing him the wife's portion, unleſs ſuch ſettlement was adequate to ſuch portion: the diverſity, as to this point, is between a ſettlement *before* and a ſettlement *after* marriage; vid. 2 Atk. 448. *per* Lord Hardwicke.

her

her truſtee. But as the eccleſiaſtical courts poſſeſſed a direct original juriſdiction in legatary cauſes, which were brought collaterally into the courts of equity by the frequent neceſſity involved in them of compelling a diſcovery of the teſtator's effects (*c*), ſome ſcruples were expreſſed, in early caſes, of the legitimacy of the pretenſion, which aſſerted, as a branch of equitable juriſdiction, this ſubject of marital claim (8). But theſe juridical ſcruples were neither general or laſting; and it was freely declared by Lord Hardwicke in *Jewſon* v. *Moulſon* (9) above cited, "that the court of Chancery will not ſuffer the huſband to take the wife's portion (though the eccleſiaſtical court, which has a concurrent juriſdiction in regard to por-

(8) Vid. *Harriſon* v. *Buckle* in Canc. 1 Str. 239. Vid. alſo 2 Vez. 18.

(9) 2 Atk. 420. and vid. Tothill 114.

(*c*) According to the preſent Chief Juſtice of K. B. it was not till the time of Ld. Chancellor Nottingham, that the juriſdiction of the court of Chancery over the queſtion of legacies was eſtabliſhed. Vid. 5 T. R. 692. But it was the opinion of Twiſden J. 1 Sid. 46. that teſtamentary cauſes did not *originally* belong to the ſpiritual courts, but to temporal courts and common law. 9 Rep. 37. b. and ſee Judge Buller's argument in *Atkins* v. *Hill*, Cowp. 285.

tions ariſing out of perſonal eſtate, may have conſented to the huſband's having it) until he has agreed to make a reaſonable proviſion for the wife, and in many inſtances has granted injunctions to ſtay the proceedings in the eccleſiaſtical court." In the caſe of *Nicholas* v. *Nicholas* (10), a decree was cited at the bar, as of the then laſt ſeal, whereby the proceedings of a huſband in the ſpiritual court for his wife's legacy were enjoined, becauſe that court could not oblige the huſband to make an adequate proviſion for his wife, as the court of Chancery would do before it would permit him to receive the legacy. In *Adams* v. *Pierce* (11) the executor was plaintiff; but Lord Macclesfield was clear as to the right of the court to impoſe terms on the *huſband* if *he* had aſked any aid in equity (*d*). A variety of ſubſequent deciſions

(10) Prec. in Chan. 548.

(11) 3 P. Wms. 11.

(*d*) The caſe of *Povey* v. *Brown*, Prec. in Chan. 325. which countenances the huſband's power of deſtroying this equity of the wife by an aſſignment of her legacy for valuable conſideration, is diſapproved of by the weighty opinion of the preſent Maſter of the Rolls, in 3 Vez. Jun. 512. And we may remark that though a legacy is ſometimes called, by perſons

deciſions has ſet this queſtion of equitable juriſdiction out of doubt (*e*). It follows, therefore, upon the ſame principle on which the caſes of *Moor* v. *Rycault* and *Wheeler* v. *Caryl* above cited were determined, that a ſettlement by a huſband on his wife, and the iſſue of the marriage, produced by a treaty with executors having in their hands a legatary portion of the wife, and declining to pay it over until ſuch ſettlement ſhould be made, ſtands on

---

ſons fond of the dangerous exerciſe of diſcovering legal analogies, an equitable choſe in action, yet that a choſe in action at law, and a legacy, are rights moſt eſſentially differing in the contemplation of a court of equity itſelf, which, while it allows an aſſignment, for valuable conſideration, of a choſe in action at law, though purely of equitable operation, to defeat the wife's contingency by ſurvivorſhip, treats the equity of the wife as attaching upon the perſon who claims, by aſſignment from the huſband, the legacy of the wife, notwithſtanding a valuable conſideration has been given.

(*e*) Vid. 3 P. Wms. 202. and the references in Mr. Coxe's Note, and vid. *Dicks* v. *Strutt*, 5 T. R. 692. where Lord Kenyon declared himſelf againſt the remedy for legacies at common law, principally on the ground of the policy and expediency of leaving the queſtion to a court which could impoſe terms on the huſband for the maintenance of his wife and family.

a firm

a firm and valuable conſideration, and is perfectly good within the meaning of the ſtatutes againſt fraudulent conveyances. Such was the doctrine of Lords King and Hardwicke in the leading caſes of *Hinton* v. *Scott* (12), and *Middlecombe* v. *Marlow* (13), in which caſes, though the ſettlement was conteſted by creditors only, the principle of the deciſion plainly extends to the claim by purchaſers.

(12) 2 Moſeley 336.
(13) 2 Atk. 519.

But as the valuable conſideration of ſettlements made under the foregoing circumſtances ſeems clearly to ariſe from the dependence of the huſband upon the aid of the court (*f*); and the opportunity which is thence furniſhed of laying him under equitable ſtipulations for a juſt proviſion for his wife and family, conſiſtency ſuggeſts the inference that the valuable conſideration can only exiſt within the bounds

(*f*) See the late caſe of *Pringle* v. *Hodgſon*, 3 Vez. Jun. 617. where the ſettlement, by the huſband, of ſtock ſtanding in the wife's name, was declared void, though the wife was admitted to have a claim to a proviſion as againſt the huſband's creditors.

of this equitable juriſdiction. Wherever, therefore, the huſband can, by an *aſſignment*, virtually and beneficially poſſeſs himſelf of his wife's intereſt, the rational ground fails whereon the valuable conſideration appears to be raiſed.

SECTION XI.

SOME diverſity of opinion has obſcured the queſtion as to the operation of aſſignments of this ſort of mixed or qualified intereſt. The effect, indeed, of a *voluntary* aſſignment by the huſband of his wife's portion is clearly eſtabliſhed (1), and ever ſince the caſe of *Jacobſon* v. *Williams* (2), it has been ſettled law, that, though by the bankruptcy of the huſband all ſuch property of the wife as he could aſſign or releaſe, paſſes to the general aſſignees by the aſſignment under the commiſſion (3), yet ſuch aſſignees ſtand only in the place of the huſband, and are ſubject to the ſame obligation in equity to make proviſion for the wife (*a*). The caſes

(1) 2 Atk. 420.

(2) 1 P. Wms. 382.

(3) 1 P. Wms. 251.

(*a*) Vid. *ex parte Coyſegame*, 1 Atk. 192. in which an obiter opinion occurring in *Miles* v. *Williams*, 1 P. Wms. 257. trenching upon the ſcope of this rule, was denied

caſes collected in the clear and accurate note (4) of the laſt editor of Pere Williams, ſtated it as a queſtionable point, whether a particular aſſignment of the wife's choſe in action (*b*) or truſt term by the huſband

(4) 1 P. Wms. 458.

---

denied to be law by Lord Hardwicke: vid. alſo 1 Atk. 280. and Mr. Coxe's note, 1 P. Wms. 458. wherein the deciſive reſult of the poſitive determinations of the courts as to this branch of the ſubject is conciſely ſtated thus: "It is clear that the general aſſignees of the huſband (whether by operation of law or *otherwiſe*) are ſubject to the ſame equity with the huſband himſelf, and it does not ſeem to be material whether the wife, huſband, or his repreſentatives or general aſſignees, come for the aid of the court;" See *Grey* v. *Kentiſh*, where the wife was a petitioner. *Jewſon* v. *Moulſon*, 2 Atk. 47. and the caſe of *Worral* v. *Marlar*, in Mr. Coxe's note, are authorities for the words of the parentheſis. See alſo 4 Bro. C. R. 139.

(*b*) The caſes cited and the reaſoning contained in Mr. Coxe's note, point only to a wife's choſes in action in *equity*; we muſt therefore, the better to underſtand the ſubject, diveſt our minds for the preſent of all concern with *legal* choſes in action; which by the arguments uſed in a future page, may appear to ſtand on a very different ground from *equitable* choſes in action. It will be endeavoured to be ſhewn, alſo, that truſt terms and equitable choſes in action of a married woman, are capable of being ſet in very different lights, as to the power of the huſband over them.

for

for a *valuable conſideration*, was a caſe over which the court of chancery would exerciſe a controul, by impoſing terms in favour of the wife upon the particular aſſignee. In regarding the queſtion as it affects the principal ſubject, it may be obſerved, that, if the juriſdiction of the court ſtopped ſhort of this extent, a contract entered into by the huſband for making proviſion for his wife, the benefit of whoſe portion (the oſtenſible conſideration for ſuch contract) it was in his power to obtain by aſſigning it for an equivalent, would want that *compulſory* ground which ſeems to form the *valuable* conſideration in theſe caſes.

Since the caſe of *Like* v. *Berisford* (5), however, this doubt may be conſidered as removed by a deciſion which has fixed upon the baſis of judicial authority the floating opinions of Lords Hardwicke and Northington. By that caſe it was decided, for the firſt time, by a decree, that if a huſband make an actual aſſignment, though for valuable conſideration, of

(5) 3 Ves. Jun. 506. and vid. *Pope* v. *Craſhaw*, 4 Bro. Chan. Rep. 326. and *Macaulay* v. *Philips*, 3 Ves. Jun. 25.

the wife's property (*c*), the equitable title of the wife to a proviſion is binding upon the aſſignee; which deciſion was expreſsly founded upon the reaſoning of Lord Hardwicke in the caſe of *Jewſon* v. *Moulſon*, above cited, who there obſerved, that, if he were to allow ſuch aſſignments to prevail, they would trip up all the care and caution of the court: for the huſband would then have nothing to do but to take up money of a third perſon.

With reſpect to the choſes in action of the wife to which the huſband has a *legal* title, it has before been obſerved, that a court of equity, unleſs called upon for its aſſiſtance in reſpect of ſuch property, will not interfere (*d*) with the huſband's legal

(*c*) The Maſter of the Rolls, by denying the caſe of *Povey* v. *Brown*, Prec. in Chan. 325., ſhews that he blended legacies and truſt monies in his conſideration of this point; and there ſeems to be no ground for treating them as diſtinguiſhable in principle, as they are connected with the preſent ſubject.

(*d*) Neither, as it ſeems, will the court, where the wife has a rent charge, interfere with the huſband's legal remedy by diſtreſs, in order to enforce a proviſion for the wife. Vid. 2 Atk. 514.

means of recovery (6). The court of Chancery has gone the length of allowing a bare *aſſignment* of a choſe in action by the huſband without *any* conſideration, though void as to the aſſignee, to change the property and veſt it in the huſband (7). But a different rule now prevails, and it ſeems to be perfectly ſettled that the wife's title by ſurvivorſhip will not be diſturbed by ſuch aſſignment by the huſband without (*e*) valuable conſideration (8). But with reſpect to ſuch *legal* ſubjects, the wife can have no claim for a proviſion as againſt an aſſignee for valuable conſideration (*f*); for

(6) Vid. *Milner* v. *Colmer*, 2 P. Wms. 639. alſo 2 Atk. 420. where a doubt on this point is intimated by Lord Hardwicke. *Winch* v. *Page*, Bunb. 86. is conſidered as very doubtful authority.

(7) Vid. *Squib* v. *Wynn*, 1 P. Wms. 380.

(8) Vid. 2 Atk. 208. *Bates* v. *Dandy*; and 1 Bro. C. R. 44. *Saddington* v. *Kingſman*.

(*e*) And it appears that beyond the conſideration ſuch aſſignment will not bind the wife ſurviving; 2 Atk. 208. 417.

(*f*) It ſeems alſo that the aſſignees under the bankruptcy of the huſband take the property in ſuch debts of the wife, clear of any equity in her favour; 1 P. W. 251. 2 Atk. 418. et ſeq. for the aſſignees are only ſubject to the bankrupt's equities, and he might have reduced the thing in action into a thing in poſſeſſion whenever he pleaſed. But it is clear that, in other caſes, ſuch intereſt of the huſband in his wife's legal choſes in

for the huſband was not originally ſubject to ſuch claim, and it would be hard to ſet it up againſt one who gave a valuable conſideration for the huſband's title. But where it was not competent to the huſband to reduce the property of his wife into his own poſſeſſion without the aid of a court of equity, the court, which will not endure to ſee its ſalutary controul eluded by circuity, conſiders the title of the aſſignee to be ſubject to a ſort of paramount equity, which adheres to and paſſes with the ſubject.

---

action, will not *paſs* without a valuable conſideration. It may be regarded, indeed, as an univerſal rule in equity, that a valuable or good conſideration is neceſſary to *paſs* the thing where the attempted transfer operates wholly by equitable ſanction, and raiſes a new title of pure equitable creation, as in the caſe of aſſignments of poſſibilities of legal eſtates and of choſes in action. Though, where the transfer has its *effect* in equity, not becauſe the *conveyance* itſelf is of equitable *operation*, but becauſe the thing transferred is of equitable *cognizance*, as in the caſe of equitable veſted eſtates, the tranſaction does not of neceſſity found itſelf upon any conſideration.

A ſettlement,

A ſettlement, therefore, of a bare choſe in action, ſtands differently circumſtanced from a ſettlement of property, which the huſband muſt borrow the aſſiſtance of equity to obtain poſſeſſion of, and, if made after marriage, ſeems unſhielded from the operation of that principle of conformity to the ſpirit of the ſtatutes againſt fraudulent conveyances acted upon in courts of equity (*f*).

The qualified maxim of *equitas ſequitur legem*, to which we muſt reſort for many of theſe diſtinctions, is admitted to apply with improved analogy where a judgment is given to a truſtee in truſt for a ſingle woman, who afterwards marries, having by the conſent of her truſtee been put into poſſeſſion of the land extended; for it ſeems clear that in ſuch a caſe the huſband may aſſign over ſuch extended in-

(*f*) Money ſecured to a feme covert by mortgage, is upon a foot with her other choſes in action. Prec. in Chan. 118.; and the diſtinction formerly allowed between mortgages in fee and for terms of years, has long ceaſed to be law. Vid. 1 P. Wms. 458. and 2 Atk. 208.

tereſt,

tereſt, notwithſtanding the interpoſition of the truſt, without *valuable conſideration*, as without doubt he may in the parallel caſe at law, where a woman, who has a judgment which is afterwards extended by elegit, marries, for it is then no longer a choſe in action but *res judicata*. In ſuch a caſe, therefore, the court will impoſe no terms on the huſband; and if he ſettles ſuch a ſubject, after marriage, it ſeems to be a voluntary and fraudulent act within the meaning of the ſtatutes againſt fraudulent conveyances. So, if the terms of a decree in favour of a feme ſole, be to hold and enjoy land till a debt due to her be paid, and ſhe is in poſſeſſion of the land under the decree, and marries, the huſband may aſſign ſuch intereſt *without valuable conſideration* (9), for ſuch equitable extent is conſtrued by analogy to a legal extent, and we have ſeen what would be the huſband's power if the extent were a ſtrict legal execution.

(9) 3 P. Wms. 196.

SECTION XII.

THIS principle of following the law has alſo been obſerved in equity, in reſpect to *terms of years* held in truſt for married women; and ever ſince the caſe of Sir *Edward Turner* (1), determined upon appeal (2) to the Lords, it has been conſidered as competent to the huſband to paſs the intereſt in ſuch equitable chattel real to his aſſignee, (except where it has been created for the wife *upon* (*a*) the marriage with the privity and conſent of the huſband), unſhackled by any equitable claim of the wife. And in a caſe (3) which ſoon afterwards came before the court, the authority of *Turner*'s caſe was con-

(1) 1 Vern. 7. and Gilb. Lex Prætoria, 279.

(2) See the decree from which the appeal was made, and which was reverſed by the judgment of the Lords. 1 Chan. Ca. 306.

(3) *Pitt* v. *Hunt*, 1 Vern. 18.

(*a*) But where the term is voluntarily created by the huſband *after* marriage, inſuch caſe effect is given to a ſubſequent alienation by the huſband for valuable conſideration by the 27 Eliz. c. 4. Vid. 1 Chan. Ca. 308.

ſidered

ſidered as overthrowing a ſeries of contrary reſolutions (*b*), and eſtabliſhing the rule in favour of the huſband; though at the ſame time Lord Nottingham animadverted upon the judgment given by the Lords in the former caſe with ſome diſapprobation. In *Tudor* v. *Smayne* (4), the caſe of Sir *Edward Turner* received a further confirmation. There, the huſband having made an aſſignment of the truſt term of the wife, a bill was brought by the aſſignee againſt the wife and her truſtees, to compel them to aſſign over the legal eſtate in the term to the plaintiff; and it was decreed accordingly, though it was ſtrongly urged by the counſel for the defendant that no ſettlement or proviſion had been made by the huſband, and that if *he* had been the plaintiff inſtead of his aſſignee, the court would not have decreed

(4) 2 Vern. 270.

(*b*) Vid. the caſe of *Doyley* v. *Perfull*, 1 Chan. Ca. 225. where it was ſaid that, ſince Queen Elizabeth's time, it had been the conſtant courſe of the court to ſet aſide all incumbrances and acts of the huſband upon the truſt in the wife's term, and to allow him neither to charge or grant it away.

the

the truſtees to aſſign to him the legal eſtate, without his firſt making a proviſion for his wife; and that the then plaintiff, who derived under him, ought not to be in any better condition. The reaſon and nature of the thing ſeem to warrant an inference that a mere *voluntary* aſſignment by the huſband of his wife's truſt term ſhould be good againſt her claim. In Lord *Carteret* v. *Paſchal* (5), it was ſaid, that the perfection of the huſband's intereſt, where the wife had an equitable extent (ſuch as the decree, on which the claim in that caſe was founded, was adjudged to amount to), gave the huſband power to aſſign it *without* conſideration; which opinion of the court was founded on the analogy which ought to be preſerved between executed legal and executed equitable intereſts. And ſuch caſe of an equitable extent was compared by the Chancellor to the caſe of a wife's truſt of a term. So that it appears to have been the opinion of Lord King, that a married woman's truſt of a term was an equitable intereſt capable of being aſſigned by the huſband *without* conſideration as againſt the wife herſelf.

(5) 3 P. Wms. 39.

Con-

Conſiſtency can only be maintained by an adherence to principle. None of the authorities which have adjudged this diſpoſing power to the huſband over a truſt term of his wife, have taken any diſtinction between *voluntary* and *valuable* aſſignments; though ſuch a doctrine has crept into all the modern abridgments and compilations.

There may be a difference as to the huſband's intereſt, between ſuch truſt terms of the wife as are *veſted*, and ſuch as are *contingent* and *executory*. For ſince a mere contingent and executory intereſt in a legal term could not be aſſigned at law, there is no *legal* analogy to govern the effect of the aſſignment in equity; and as the aſſignments of ſuch intereſts have wholly their foundation in equity, to inſiſt upon a valuable conſideration, or fetter them with conditions in favour of the wife, ſeems no improper exerciſe of equitable juriſdiction. And there is good reaſon and authority for ſaying, that a man cannot aſſign the *legal* intereſt in his *own* term, ſo as to bind his repreſentatives,

tatives, if ſuch intereſt be only a poſſibility or contingency, without a conſideration (*c*) either in the firſt or ſecond degree (6). But there appears to be no difference, as to the effect of the huſband's aſſignment, between a term in truſt to raiſe a ſum of money for a woman, and the truſt of the term itſelf, or

(6) Vid. 2 Ves. 411.

(*c*) The reaſon for the neceſſity that exiſts for a good conſideration to ſupport ſuch aſſignments of contingent, legal or equitable, intereſts, (for whether the ſubject be legal or equitable, the aſſignment has its *operation* only in equity), is found in that principle of equitable conſtruction, by which they are looked upon in the light of contracts or agreements, which, to entitle them to the aſſiſtance of the court, muſt be founded at leaſt upon a *meritorious* conſideration. For equity will not be moved to interfere with the law, but where either a purchaſer in the firſt or ſecond degree claims its aſſiſtance. And its practice in this reſpect ſeems to turn upon the rule, that, whatever it will do for a *valuable purchaſer*, it will do for a *wife* or *child*, which is a ſecondary ſort of purchaſer in equitable conſideration, where no creditors or other valuable claimants appear, againſt mere volunteers. And it ſeems to follow, that wherever a court of equity will uphold an aſſignment of a legal executory intereſt, it will ſupport an aſſignment of a parallel intereſt in equity, for otherwiſe it would not merely offend againſt the rule of *equitas ſequitur legem*, but commit an inconſiſtency

or an equitable chattel real, for where ſuch ſuppoſed diverſity was urged at the bar in the caſe of *Walter* v. *Sanders* (7), the Maſter of the Rolls refuſed to liſten to the diſtinction, and held himſelf bound to decree (though, as he ſaid, againſt his conſcience) in conformity with the ſolemn

(7) 1 Eq. Ca. Abr. 58.

ſiſtency with itſelf. But ſince, where the aſſignment is made by a perſon intereſted in his own right, equity will lend it no countenance unleſs it poſſeſs the merit of a good or valuable conſideration; ſo where it is an aſſignment by a huſband of ſuch legal or equitable contingent intereſt of his wife, there muſt neceſſarily be a *valuable* conſideration to ſupport it, for a conſideration in the *ſecond degree* cannot prevail againſt the *meritorious* claim of the wife.

But to purſue the ſubject a ſtep further; if the equitable or legal contingent intereſt of the wife in her chattel expectancy be ſuch, as that it cannot become *veſted* in her during the huſband's life, as where a term is given to or in truſt for the huſband and wife and the ſurvivor, it may reaſonably be doubted whether equity will give effect to an aſſignment by the huſband of his wife's intereſt even for *valuable* conſideration. For there muſt be ſome rules of conformity to limit this equitable juriſdiction; and it may be obſerved that, in all the inſtances wherein it has given operation to the aſſignment of this ſpecies of intereſt, the law itſelf, where

lemn judgment given in the caſe of Sir *Edward Turner.*

So in a ſubſequent caſe (8) it was taken by the court to be well ſettled, that where a wife has the truſt of a term, the huſband has an abſolute power of diſpoſition over it. In Lord *Carteret* v. *Paſ-*

(8) Prec. in Chan. 419.

---

the ſubject has been *legal*, has preſented ſome mode either by fine or releaſe of effecting an alienation of the thing. But of ſuch an executory and contingent intereſt of the wife at law, the huſband has no *legal* means of diſpoſing *by himſelf.* By fine he cannot without the concurrence of the wife; neither, as appears in *Lampet's* caſe, 10 Rep. 51. a. and vid. 1 Rep. 99. a. 111. b. Popham, 5. 1 Salk. 326. can he reach it by aſſignment or releaſe. If, however, ſuch intereſt of the wife in a term of years is created by the huſband himſelf after marriage, as in 1 P. Wms. 364. *Watts* v. *Thomas*, where the huſband purchaſed a term for years to himſelf and his wife and the ſurvivor, and the executors, &c. of ſuch ſurvivor; the huſband may clearly, by the operation of the ſtatute 27 Eliz., alien ſuch contingent intereſt of his wife, by a ſimple aſſignment at law for valuable conſideration. If he only mortgages it, whereby it is converted into an equitable chattel after the forfeiture, the equity will ſurvive to the wife, but not, as it ſhould ſeem, as againſt the huſband's creditors, even though their debts were contracted ſubſequently to the ſettlement.

(9) 3 P. Wms. 200.

chal (9) the ſame doctrine prevailed, and it was conſidered as furniſhing a principle applicable to the caſes *there* put of equitable extents. The rule was acquieſced in by Lord Hardwicke in the caſe of *Bates* v. *Dandy* (10), and again afterwards in the great caſe of *Jewſon* v. *Moulſon* (11) (*d*). In a very late caſe the ſame doctrine was reluctantly recognized by the preſent Maſter of the Rolls, who ſeems to doubt whether

(10) 2 Atk. 208.

(11) 2 Atk. 421.

(*d*) It has been ſaid (vid. Treat. of Eq. Fonbl. note o. to ſect. 6. book 1.) that the caſe of *Strathmore* v. *Bowes*, 2 Bro. C. R. 345. has conſiderably weakened the authority of theſe caſes. In anſwer to which obſervation it may be remarked, that in the caſe of Sir *Edward Turner* and of *Pitt* v. *Hunt*, it was the particular nature and quality of the intereſt that attracted the marital claim, and thoſe caſes turned upon no queſtion of fraud upon the huſband. In *Strathmore* v. *Bowes*, the claim of of Bowes depended upon the queſtion, whether the court would conſider the power of diſpoſition which the widow had created for herſelf (and which was ſuch by its own nature, as that, if ſuffered to exiſt at all, it could not become a thing diſpoſeable by the huſband, as a fraud upon the marital rights. In *Turner*'s caſe, as well as in thoſe of *Pitt* v. *Hunt* and *Tudor* v. *Smayne*, the huſband did not found his pretenſions upon his right to *overthrow* the intereſt which had been created, but upon his right by *legal conſequence* to the diſpoſition of it.

the

the (12) principle upon which the court of Chancery has exerciſed a controul over the diſpoſition of this ſort of property, can conſiſtently ſtop ſhort of any caſe where the ſubject is of equitable cognizance, and not to be come at by legal remedies. Until a future deciſion ſhall remove this reſpectable doubt, it may not be preſumptuous to call the reader's attention to ſome lineament of an eſſential diſtinction, which diſcriminates the practical ground of relief in theſe kindred caſes.

(12) Vid. 3 Vez. Jun. 19. *Macauley* v. *Phillips*; and vid. *Pryor* v. *Hill*, 4 Bro. C. R. 139.

In a view to this particular branch of enquiry, viz. the effect of the huſband's aſſignment of his wife's property, ſuch property may perhaps admit of a nominal diviſion into choſes in action—ſuſpenſive executory truſts—and executed abſolute truſts. With reſpect to the firſt denomination, we ſhould bear in mind that a choſe in action is a mere legal right, with which, as a right, courts of Equity have nothing to do; as a right it ſeems (*e*) to be ſub-

(*e*) Some doubt is caſt over this part of the deſcription by what occurs in 2 Atk. 420. and Bunb. 86.

ſubject to no equities. But a *right* to a *benefit*, is regarded as an *intereſt* by courts of Equity, which, contemplating the intereſt as abſtracted from the right, allows it to be ſeparately aliened, and to be treated as a diſtinct ſubject of negociation and transfer. As no equity ſeems originally to be attached to the thing, it muſt ſpring up in the very act of ſeparating the intereſt from the right. But, ſince, where the huſband is entitled to a thing in action in right of his wife, he muſt join his wife with himſelf in an action to recover it; and, in the mean time, the wife has a chance of benefit by ſurvivorſhip, the court will not give effect to the transfer by carrying the divided intereſt or equity to the transferree in deſtruction of the contingent expectation of the wife, unleſs the aſſignment is ſupported by a valuable conſideration; for the rule is, that no *new equity can ſpring up* in favour of a mere volunteer in derogation of an antecedent intereſt however minute.

But the courts of Equity, having allowed and ſanctioned the conveyance of

ſuch untangible intereſts, would ſeem to contradict and defeat their own principles and objects by denying to ſuch a conveyance the effect of a plenary transfer; and their general object of facilitating the interchange of property by rendering it more pliable to the occaſions of commerce and ſociety, would be fruſtrated by their own outrageous caution in ſubjecting the purchaſer for valuable conſideration to an equity which was not originally attached to the thing itſelf, and holding him liable to the moral obligations of another, which there was no equity to enforce, *before* the alienation, againſt the party himſelf ſtanding in the relation to which ſuch moral obligation referred.

Where the property of the married woman is in the tangible ſhape of money, the truſt reſpecting it may be called *ſuſpenſive* and *executory*. Here, as there is no way for the huſband to enforce payment, but by the compulſory interference of a court of Equity, an original equity becomes attached to, or if it be not too bold a phraſe, conſubſtantiated with the thing

itſelf. The truſtee or executor is in ſuch a caſe the active medium through which the bounty is to be carried home to the object; it is a directory charge upon their conſciences, and receives its completion at their hands. They are not to *hold* but to *do* ſomething for another; they have no *eſtate*, which can be anſwered by a correſpondent equitable eſtate in the *ceſtui que* truſt or legatee, but have ſimply an office to diſcharge. The thing given moves in one line of direction from the donor to the donee without the creation or ſuppoſition of two coeval and correſpondent eſtates in law and equity.

But as, in theſe caſes of legacies and truſt monies, the truſtee or executor has a duty to perform, before the gift is perfected, which duty the aid of the court is requiſite to enforce, the rule that exacts the the performance of equity before equity can be granted, raiſes an original equity in behalf of the wife. The equity, therefore, in this caſe, having ſprung up *before* the alienation, there ſeems to be no reaſon for conſtruing the aſſignee to be in a better condition than the

the perſon under whom he claims. But a ſtrong argument from inconvenience and abſurdity accedes to this reaſoning from the nature of the thing, ſince, according to the obſervation before borrowed from Lord Hardwicke, if ſuch aſſignment were ſuffered to prevail, an eaſy circuity might fruſtrate the ſolicitude of the court for the maintenance and protection of married women.

Truſt terms are among the *abſolute* or *executed* truſts which form a diſtinct claſs in the conſideration of this ſort of property. Being equitable intereſts *originally*, their very conſtitution differs from that of choſes in action; and, as an aſſignment of ſuch an intereſt does not draw its immediate operation from any equitable conſtruction ſupplying its deficiency of force at law, but belongs to the nature of the thing, the ſame neceſſity for a conſideration to effectuate the conveyance, and alter the property, ſeems not to exiſt, as where the transfer being unauthorized at law, can carry no benefit to the aſſignee, but by firſt *raiſing* an

equity between the parties. The neceſſity for an univerſal agreement in the rules of all courts relating to eſtates in land, which has given birth to the maxim of *equitas ſequitur legem*, ſuggeſts the reaſon of the diſtinction that plainly exiſts between the monies and legacies of a married woman in the hands of her truſtees and executors, and her equitable intereſts in terms of years, which, being unintelligible but by reference to their correſpondent eſtates at law, ſeem to depend for their very eſſence and attributes upon a ſtrict analogy of rule and conſtruction.

The maxim therefore of *equitas ſequitur legem*, and the rule of expediency, ſeem to require that the power of diſpoſition by the huſband in this caſe of a truſt term of the wife, ſhould not be fettered by executory obligations, and paſs to the aſſignee defalcated of its value by extrinſic claims, and the interference of a diſcretionary juriſdiction; and if the rules of law have the ſimilitude of ſcience, we muſt diſtinguiſh, as to the effect of an aſſignment by the huſband, between the wife's pecuniary

niary portion, which is to have its effect through the medium of an active duty in the truſtees, who are the depoſitaries of the thing itſelf, and effectuators of the donor's intention, and a truſt term deſcriptively aſcertained and limited, conſtituting a viſible eſtate in the *ceſtui que* truſt, cloathed with the ſame quality of transferrability as a perfect common law eſtate, and differing from it only by being the object of the peculiar juriſdiction of a court of Equity (*f*). In the firſt caſe we view the

(*f*) The principle of this diſtinction may be traced back to very high legal antiquity. The ſpecial directory truſt is noticed by Lord Bacon, in his reading on the Stat. of Uſes, p. 9. as being very different from the general and *permanent* truſt, which was properly the *uſe*. Theſe diſtinct ſorts of uſes or truſts, before they became the object of any ſtatute, differed no leſs in their conſtruction and effects than in their nature and extent. See the obſervation in 12 Rep. 26. They have been compared to the *jus precarium* and *jus fiduciarium* of the civil lawyers. The equitable eſtates in real property, adverted to above, are the legitimate deſcendants of the ancient *permanent* uſes, which, upon the old maxim of *æquitas ſequitur legem*, were always deſcendible, in a courſe analogous to eſtates of inheritance at the common law.

ſub-

ſubject as a mere fiduciary depoſit,—a thing of manual transfer, in reſpect to which, the court of Chancery will make uſe of the neceſſity for its interference as an inſtrument of occaſional controul, whereby the huſband, who calls for equity, may be obliged to *do* equity. But we are juſtified upon the true ſpirit of the maxim of *equitas ſequitur legem* in viewing all truſt terms as eſtates of a meaſured quantity and definite intereſt, not depending on a flux diſcretionary juriſdiction, but on a fixed and ſcientific baſis of legal analogy (*g*).

Theſe obſervations may furniſh ſome ground for a more accurate delineation of the diſtinctions affecting the marital power over the ſeveral kinds of truſt property, to which a married woman may

(*g*) See what was ſaid by Lord Nottingham, in his ſecond argument in the *Duke of Norfolk's* caſe, on the correſpondence between the rules of equity and common law as to terms of years, Chan. Ca. 48. and ſee the argument of Lord Keeper North in the ſame caſe, 1 Vern. 164.

be

be entitled; for that there *is* a difference in *principle* between the legacies and truſt monies, and the truſt terms of a married woman, is a propoſition as clear as the diverſity between perſonal chattel or moveable property, and eſtates in land, which laſt ſhould have the ſame meaſure in law and equity, and call for an analogy and correſpondence of deciſion.

The connection which the learning on this point has with the ſubject of this eſſay will be found in the dependence which the queſtion as to the voluntarineſs or valuableneſs of ſettlements made by huſbands under the circumſtances above ſuppoſed, muſt have upon the *preliminary* queſtion, *i. e.* whether a court of Equity will extend to the particular caſe its compulſory interference.

SECTION XIII.

THE ſettlement which takes place upon the ſeparation of the married parties, is an important branch of this ſubject. The books contain but few caſes upon the validity of ſuch ſettlements as againſt purchaſers and creditors; and the reſult of ſuch reſolutions as are to be found upon the queſtion, ſeem to reſt it upon the alternative of the inſertion or omiſſion of a covenant by the wife's friends or truſtees to indemnify the huſband. It would ſeem inconſiſtent, if the mere interruption of the marriage union, without the authoritative interference of a court of Spiritual Judicature;—of that union, which the common law regards as ſo weighty and valuable a conſideration, could be *of itſelf* an available conſideration as againſt creditors and ſubſequent purchaſers. But, as a huſband's rights and a huſband's obligations form a reciprocal ground for ſtipulation and contract, it ſeems to have been holden that, where there are

are parties to contract, a covenant to indemnify againſt the one, may be a fair and ſufficient conſideration for a retrenchment or abandonment of the other. Maintenance of a wife and children, however preſſing as a moral duty, is generally no anſwer to valuable purchaſers, or to creditors whoſe debts were prior to the ſettlement; and there ſeems to be nothing in the mere ſeparation by agreement to attract any greater regard. But where the huſband purchaſes an exemption from charge by the contract of ſeparation and maintenance, he has apparent motives of pecuniary influence, and a ſtipulated return in value for the intereſt or property he parts with. And ſuch a ſettlement for ſeparate ſupport has in it, perhaps, more of the quality of a veritable and peremptory contract, than where a ſettlement after marriage for the ſeparate uſe of a wife, being made in proſpect of continuing harmony and cohabitation, promiſes to the huſband a reſulting ſhare in the benefit oſtenſibly transferred.

But, independently of this collateral covenant to indemnify the huſband, a deed of

of ſeparate maintenance; muſt be looked upon as having a very precarious operation as between the parties themſelves. Our common law, which breathes ſo much reverence for the matrimonial contract, has made no proviſion for capricious ſeparations; but regarding marriage as a rite of ſcriptural ordination and primæval ſanctity, has left to the *ſpiritual* judge the cognizance of its ſocial and moral concerns. Thus the law looks to the duration of the union of marriage as commenſurate with the lives of the parties, and has not incurred the reproach of inconſiſtency by raiſing a valuable conſideration out of the diſſolution of that engagement which it regards as the moſt valuable of all conſiderations. And ſo tender is the policy of the Engliſh juriſprudence of lending countenance to divorces, that it has been authoritatively ſaid (1) that no court, either of temporal or ſpiritual juriſdiction, has an *original* authority to give a ſeparate maintenance to a married woman.

(1) Vid. 2 Vez. Jun. 191.

It ſeems agreed, that the eccleſiaſtical judge holds his power of decreeing alimony

mony as *incidental* to his natural and authentic juriſdiction (*a*). Though the ſupplicavit in Chancery is of itſelf only a ſecurity for the wife upon the ſuppoſition that ſhe is to live with her huſband, yet it has been ſaid, that where it is neceſſary for the ſecurity of the peace, that the huſband and wife ſhould live apart; this proceſs has drawn to itſelf an *incidental* power of a ſimilar kind to that above mentioned (2). But it has been laid down as contrary to the doctrine of that court to entertain a ſuit by a married woman for ſeparate maintenance, as a ſubſtantive and primary object of her bill (3). And the caſes of *Oxenden* v. *Oxenden* (4), *Williams* v. *Callow* (5), and perhaps *Watkyns* v. *Watkyns* (6), have been over-ruled by the caſes of *Head* v. *Head* (7), and *Ball* v. *Montgomery* (8). It ſeems, indeed, to have been conſidered till lately

(2) 2 Vez. Jun. 195.

(3) Ibid.

(4) 2 Vern. 493.

(5) 2 Vern. 752.

(6) 2 Atk. 96.

(7) 3 Atk. 547.

(8) 2 Vez. Jun. [illegible]

(*a*) The incidental power of the eccleſiaſtical court to decree alimony on a decree *propter ſævitiam* has not been doubted; but theſe decrees for alimony affect no part of the huſband's eſtate, ſo as to take it from creditors, but are merely againſt the perſon of the huſband.

as ſettled law, that wherever there has appeared in ſuch caſes of ſeparation an expreſs or implied agreement (*b*), the court of Chancery has the power of decreeing a ſeparate maintenance. But the importance of this diſtinction between the caſes which have, and thoſe which have *not* reſted upon an agreement between the parties, may be conſidered as ſomewhat queſtionable, ſince the modern caſe of *Legard* v. *Johnſon* (9), in which the court of Chancery cautiouſly miſtruſted its own competency to break in upon the integrity of the common law (*c*.) The Lord Chan-

(9) 3 Vez. Jun. 352.

(*b*) A divorce in the eccleſiaſtical court has been conſidered as raiſing this implied agreement.

(*c*) If this and other adjudications ſubſequently noticed in the text, which have manifeſted a ſimilar ſpirit, have really laid any foundation for future conſiſtency and firmneſs of doctrine on this ſubject, beſides their ſalutary recognition of legal principles, we ſhall be indebted to them for relieving us in part from the labour of exploring our way amongſt obſcure and dubious caſes. The four caſes of decrees for alimony in the court of Chancery which occur in the book called Chancery Reports, viz. *Laſbrook* v. *Tyler* 24. *Lady Aſhton* v. *Aſhton* 87. *Ruſſel* v. *Bodwill* 99. *Whorewood* v. *Whorewood*

cellor in that caſe was of opinion, that, upon a queſtion of power in the court, upon

---

wood 118. are ſhortly and looſely ſtated; and it does not appear whether or not any of them were ſupported by proceedings in the eccleſiaſtical courts, or by any agreements between the parties. The three laſt caſes, which were decided during the uſurpation, and while the ſpiritual juriſdiction was ſuſpended, by commiſſioners expreſsly empowered to decree alimony, and confirmed by the act for confirming judicial proceedings, are not authorities as to this point of juriſdiction. *Williams* v. *Callow*, and *Watkyns* v. *Watkyns*, referred to in the text, are caſes wherein this juriſdiction has been exerciſed by the court of Chancery without any foundation in the agreement of the parties. In the caſe of *Sealing* v. *Crawley*, 2 Vern. 386. and the late caſe of *Guth* v. *Guth*, 3 Bro. C. R. 614. the court appears to have proceeded upon the *agreement* of the parties. In *Angier* v. *Angier*, Prec. in Chan. 497. written *Engier* v. *Engier*, in Reg. Lib. there was an agreement, and alſo ſome other very ſtrong ingredients to juſtify the interference of the court. In *Nicholls* v. *Danvers*, 2 Vern. 671. as appears from the Regiſter's book, though not in the report of the caſe in Vernon; and in Baron Gilbert's report of *Oxenden* v. *Oxenden*, a ſentence of divorce had been obtained in the eccleſiaſtical court. Though in the laſt mentioned caſe, as it is reported in Prec. in Chan. 239. the court ſeemed to diſclaim any aſſertion of power to decree a ſeparate maintenance, and to chuſe rather to reſt its authority on its controul over the fund

upon a general caſe of articles of ſeparation founded upon mere diſcordancy of temper without reproach on either ſide, to carry into effect a deed of ſeparation between huſband and wife, he could not ſtate the contract to be higher in point of law than a perſonal contract between the huſband and wife *ſtante matrimonio* (*d*); but that the caſe before him

---

as being in the hands of truſtees. In *Head* v. *Head*, 1 Atk. 295. Lord Hardwicke ſeemed to think that the juriſdiction of the court of Chancery in reſpect of theſe decrees of ſeparate maintenance ought to confine itſelf to caſes of agreement, truſt, and a previous ſentence in the ſpiritual court. The modern caſes cited in the text have an apparent tendency to abridge the controverſy, and perhaps to cloſe the debate on ſome of theſe diſtinctions for ever.

(*d*) Theſe caſes of ſeparate maintenance ſeem all very diſtinguiſhable in principle, as they are connected with the preſent ſubject, from thoſe which have frequently ariſen upon the elopement of the wife entitled to ſeparate property provided for her by articles before marriage, wherein it has been determined that to a bill brought by the wife for ſpecific performance, it was not an anſwer for the huſband to ſay, that the wife had eloped, and lived in adultery. Vid. *Sidney* v. *Sidney*, 3 P. Wms. 268. and the caſe in the note ſubjoined by Mr. Coxe.

compelled

compelled him to go further, and to conſider that contract a ſeparation by which the huſband and wife exclude and exonerate each other from the rights and duties ariſing from matrimony. His Lordſhip cited the caſes of *Mildmay* v. *Mildmay* (10), and *Hincks* v. *Nelthrope* (11), in both which caſes the court refuſed to entertain any juriſdiction upon a contract between huſband and wife. It was obſerved alſo by his Lordſhip, that in the caſe of *Head* v. *Head* (12), Lord Hardwicke had expreſſed the ſame opinion as to the defect of juriſdiction in the court, and had ſaid that where the court interfered, it had very unwillingly acted at all.

(10) 1 Vern. 53. 2 Chan. Ca. 102.

(11) 1 Vern. 204.

(12) 3 Atk. 295 547.

Upon this opinion of Lord Hardwicke, the preſent Chancellor further obſerved, that the caſes in which the court had acted thus unwillingly, were firſt, where a third party had intervened, as where a third perſon, with whom the huſband might contract, bound himſelf to indemnify the huſband againſt the debts of the wife,

which raiſed a proper conſideration (13). The ſecond order of caſes in which there was a plain ground for the court to go upon, was where a fortune accrued to the wife *after* ſeparation, and the court was applied to for making ſome proviſion for her out of it (14). "For if," ſaid his Lordſhip, "it happens from the ſituation of the parties, that they cannot enjoy in common *that* which ſhould maintain *both*, it would be very hard that the party from whom it moves ſhould loſe and the other ſhould gain the *whole* benefit of it." The Chancellor then mentioned as a third ſort of caſe wherein a court of Equity might take into conſideration the duties ariſing from the relation of marriage, *that* wherein the property being in truſt could only be ſued in equity. He was, therefore, of opinion, that the incompetency of the court to enter into the conſideration of the rights and duties ariſing from marriage was an anſwer to the bill; and upon the general abſtract queſtion, he obſerved, that he had met with no caſe except *Guth* v. *Guth* (15), (which he ſhould wiſh a further account of, as his opinion inclined againſt it) to

(13) Vid. *Sealing* v. *Crawley*, 2 Vern. 386. & *Angier* v. *Angier*, Prec. in Chan. 497.

(14) Vid. *Nicholls* v. *Danvers*, 2 Vern. 671.

(15) 3 Bro. Chan. Rep. 614.

entitle the court to hold ſuch a juriſdiction.

The principle of this caſe, though it imports a tendency to reſtore to the ſpiritual juriſdiction its proper cognizance, ſeems evidently to be grounded on the adoption of an ancient legal maxim which has been ſhaken by a caſe determined in the court of King's Bench (16) in the time of the late Chief Juſtice. In that caſe the poſitive rule of law, according to which a married woman can acquire no property, real or perſonal, and is under an incapacity to contract, was ſaid to have given way to the prevailing cuſtoms and manners of the times, and to the more convenient doctrine (17) by which a feme covert, aſſuming the appearance of a feme ſole, is *to all intents* and *purpoſes* capacitated to act as ſuch. And by the judgment of that court it was implicitly reſolved, that a huſband having ſettled a ſeparate maintenance upon his wife by deed, was totally and ultimately diſcharged at law from her debts and contracts. If that caſe, and others of the ſame complexion, and the opinion of the

(16) *Corbett v. Poelnitz*, 1 T. R. 5.

(17) See the anſwer to this ſort of argument in *Manby v. Scott*, 1 Sid. 109.

court expreſſed in *Angier* v. *Angier*, have finally reformed the law in this reſpect, there ſeems to be but little ground for the ſcruples of the court of Chancery in any caſe to decree a ſpecific performance of articles of ſeparation; ſince if the ſeparation be complete in law, and the huſband has thereby a perpetual and radical releaſe from his marital obligations, the court, as it ſhould ſeem, can conſiſtently feel neither want of juriſdiction nor want of conſideration as an obſtacle to its interference; neither, as it appears, will there exiſt any good ground for the diſtinction between caſes *with* and *without* the ingredient of a covenant from a third perſon for the indemnification of the huſband, which has hitherto governed the deciſions of the courts in queſtions between parties claiming under ſuch ſeparate maintenances by deed, and perſons coming in upon valuable conſiderations, under the ſtatutes of Elizabeth. But the courts, both of law and equity, have viewed with jealouſy and ſigns of diſapprobation the caſe of *Corbett* v. *Poelnitz*. They have not adopted its general poſitions; but by ſubſequent deciſions

ciſions its authority has been reduced to caſes of perfect circumſtantial coincidence. In *Hyde* v. *Price* (18), the Maſter of the Rolls brought into view all the caſes on the ſubject, and added to his own the doubts of Lord Kenyon, expreſſed in *Ellah* v. *Leigh* (19), and *Clayton* v. *Adams* (20).

(18) 3 Ves. Jun. 437.

(19) 5 T.R. 679.

(20) 6 T.R. 604.

Whether a feme covert ſole trader by the cuſtom of London, was liable to be ſued in the King's Courts upon her contracts without her huſband, (the queſtion as to her power of ſuing without her huſband having been determined in the negative in the caſe of *Caudell* v. *Shaw* (21), has recently been decided by the judges of the exchequer chamber in correſpondence with the ancient rule of law as to the general legal incapacities of a feme covert (22). A difference, however, has been attempted to be taken between this caſe of a feme covert ſole trader by the cuſtom of London, and a feme covert *living apart* from her huſband, as to the queſtion under conſideration; for while it has been admitted that in the firſt caſe the huſband, by rea-

(21) 4 T.R. 361.

(22) *Beard* et ux. v. *Webb* et al, C. P. Hil. Term, 1800.

ſon of his retaining his intereſt in the perſon and liberty of his wife, though not in her effects, ought to be made a co-defendant, it has been contended that the total annihilation of the huſband's intereſt in the perſon as well as the property of the wife enjoying a ſeparate ſupport ſecured to her by deed, gives to her the entire capacity to ſue and be ſued (*f*), and to charge herſelf perſonally as a feme ſole. But this is taking *pro conceſſo* a ſuppoſed effect of the deed of ſeparation, which may not ſo readily be allowed. It ſeems by no means clear that the parties, notwithſtanding ſuch an inſtrument, may not proſecute in the ſpiritual court for a reſtitution of conjugal rights, and, as was obſerved by the preſent Chief Juſtice of the Common Pleas in the caſe above referred to, it remains to be ſeen whether ſuch court would hold it in the power of the parties them-

(*f*) In *Gordon* v. *Halpen* et ux. though the ſettlement of the wife's property upon her was confirmed by a decree of the Houſe of Lords to be for her ſeparate maintenance, Lord Hardwicke C. J. would not permit a ſeverance in pleading. Vid. ca. temp. Hardwicke 101.

ſelves

ſelves to diſſolve any of the duties of that particular contract which was formed in the preſence of God, and whether in ſuch caſe the courts of common law would grant a prohibition.

If the huſband can be diſcharged by contract with his wife from all poſſible liability to her future debts, then are the rights and duties ariſing upon the connubial connection dependent upon the will or caprice of the married parties. This ſeems to be the true ſtate of the queſtion; for if the huſband can diſcharge himſelf by ſuch contract with the wife, the barrier is burſt by admitting her deed to be good in law; and after this it ſhould ſeem to be an inconſiſtent ſcrupuloſity to require the huſband to be made defendant in actions upon the contracts of the wife, while living on a ſeparate maintenance ſettled by deed. It appears then, that the doctrine which diſcharges the huſband, and capacitates the wife to be ſued without him, where they are ſeparated by deed, muſt involve the propoſition that the relation of marriage is wholly ſubmitted to their

their ſpontaneous motions, and, except to the purpoſe of a ſecond marriage, a momentary diſcord may diſunite the moſt ſacred and important of civil and religious connections.

This abſolute and final diſcharge of the huſband from the debts of his wife, contracted during her ſeparation from him, ſeems to have been admitted in *Angier* v. *Angier*, above cited, and to have been decided (perhaps not irrefragably) in the caſes of *Ringſtead* v. Lady *Laneſborough* (23), *Barwell* v. *Brookes* (24), and the beforementioned caſe of *Corbett* v. *Poelnitz*, which ſeemed to turn wholly upon the *poſtulatum* that the huſband, in ſuch caſes of ſeparation by deed, has a plenary diſcharge at law (*g*); and that being not liable to the debts of his wife or amenable to judgment

(23) Co. Bank. Laws, 29.

(24) Id. ibid.

(*g*) If ſuch deed can operate as an abſolute and final diſcharge of the huſband, and to endue the wife with the legal capacities of a feme ſole, conſiſtency and uniformity require that all thoſe opinions muſt ceaſe to be law which aſſert the huſband's controul with reſpect to ſuch perſonal property as accrues to the wife after her ſeparation. Sed vid. *Palmer* v. *Trevor*, 1 Vern. 261.

or

or execution, it were abſurd to inſiſt upon his being joined in the action. But the *poſtulatum* is the point in diſpute; a very different ſenſe of the exigency of legal principle and legal policy was entertained in *Hatchett* v. *Baddeley* (25), and *Lean* v. *Schutz* (26), by the judges who decided thoſe caſes. And particularly in the firſt-mentioned of thoſe caſes, the peril of inroads upon fundamental maxims was forcibly illuſtrated by example. Courts of equity have on this queſtion felt the danger of diſturbing the elements of law. Where theſe courts have fully eſtabliſhed the dominion of a married woman over her ſeparate property (*b*), and have decreed truſtees to convey according to her directions, they have prudently ſhrunk from the propoſition that a wife can charge herſelf *perſonally*, and have refuſed decrees to compel her to perform her *perſonal* en-

(25) 2 Blackſt. 1081.

(26) 2 Blackſt. 1195.

(*b*) This power in its full extent ſeems to have been doubted by Lord Hardwicke in the caſe of *Peacock* v. *Monk*, 2 Vez. 191. but the point ſeems to have been ſettled in the affirmative by the caſe of *Wright* v. *Cadogan*, 6 Bro. P. C. 156.

gagements

gagements or to bind her real eſtate to the fulfilment of her *general* obligations (*i*).

But the generality even of this rule, eſtabliſhing in equity the abſolute controul of a wife over her ſeparate property, has been reſtrained by a late caſe (27) determined in the court of Chancery; the judgment of which caſe ſeems to ſuppoſe a clear diſtinction between the proviſion of a married woman ſettled upon her after marriage by way of ſeparate maintenance, and property limited by the marriage articles or ſettlement to her ſeparate uſe, as to the extent of her dominion over it; and the Maſter of the Rolls ſeemed to be of opinion that a feme covert has only the uſufruct without a power of alienation with reſpect to that property which conſtitutes her excluſive ſupport under a deed of ſeparate maintenance. The peculiar deſtination of this property annexes according to the reaſoning of that caſe a

(27) *Hyde v. Price*, 3 Ves. Jun. 437.

(*i*) This ſeems to be the true ſenſe of the caſe of *Hulme* v. *Tenant*, 1 Bro. Ch. Rep. 16.

neceſſary

neceſſary limitation to the wife's intereſt in it and power over it; and this doctrine turns, as it ſhould ſeem, upon the huſband's being onerated at law with his wife's ſuitable expences notwithſtanding the deed of maintenance. Agreeably to which opinion it was obſerved in the argument for the defendant in *Lean* v. *Schutz* above cited, that the agreement being for the ſpecial purpoſe of ſeparation ought not to be carried beyond it; and though the arguments of counſel are not meant to be referred to as authorities, yet it may not be irregular to remark that in the reaſoning on the defendant's ſide in that caſe, will be found in a ſhort compaſs ſome of the ſtrongeſt grounds in ſupport of the ancient rule of law. Our attention is attracted by the cogent remark of the Maſter of the Rolls in *Hyde* v. *Price*, viz. that it was not determined in *Corbett* v. *Poelnitz* what was to be the caſe if the wife ſhould become a pauper; could not the pariſh call upon the huſband to maintain her? And we are reminded by a modern writer (28) that the caſes of *Ringſtead* v. *Laneſborough*, *Barwell* v. *Brookes*, and *Corbett*

(28) Fonbl. Eq. Ti. B. 1. c. 6. note P.

bett v. *Poelnitz*, (though they have been ſuppoſed to furniſh a general rule of law), do not advert to the adequacy of the ſeparate maintenance, or to the circumſtances of the huſband at the time of ſecuring it.

We may extract from the graveſt authorities the following ſimple propoſitions. A woman by her marriage becomes to all legal purpoſes *one* with her huſband. In conſideration of law he cannot ſeparate his wife from himſelf for the purpoſe of making a gift to her of any part of his property real or perſonal (*k*) ſo as to veſt in her an excluſive right during his life. A wife has no inherent original power of contracting even for neceſſaries againſt his conſent, but her power of charging him for neceſſaries and things ſuitable to his

(*k*) Co. Litt. 3. courts of equity have recognized and reſpected the rule; vid. *Moyſe* v. *Giles*, 2 Vern. 385. *Beard* v. *Beard*, 3 Atk. 72. But it muſt be confeſſed that in many caſes theſe gifts have been ſupported in equity. Vid. *Stanning* v. *Stile*, 3 P. Wms. 334. *Bell* v. *Hyde*, Prec. in Chan. 328. *Moore* v. *Freeman*, Bunb. 205. ſed vid. *Legard* v. *Johnſon*, cited ſupra, 320.

degree, is founded on a reaſonable preſumption of law, which implies his aſſent to her being furniſhed with ſuch things as are neceſſary to her ſupport. Her contracts to this effect are conſtrued as being made with his authority and to his uſe (*l*). The jury are the judges of this implicit aſſent. If a huſband allows his wife a ſeparate maintenance, while that ſupport continues, the implied promiſe is ſatisfied and performed, and generally the huſband making ſuch allowance is not liable to the debts of his wife. So it was ruled in *Todd* v. *Stoakes* (29). But we may infer from the diſtinctions taken in that caſe, that it is not the contract or deed of the huſband which diſcharges him; for if the articles of ſeparation in *Todd* v. *Stoakes* had by their own force exonerated the huſband, there would have ſeemed to be ſome inconſiſtency in the ſubſequent remark in that

(29) 1 Salk. 116. Lord Raym. 444. coram Holt C. J. Ni. Pri.

(*l*) The eight judges for the defendant in *Manby* v. *Scott*, 1 Sid. 120. were agreed in this doctrine. The whole twelve agreed that the wife could in no caſe contract ſo as to charge herſelf.

caſe;

caſe; for the Chief Juſtice obſerved, that if the wife had come immediately from her huſband after the ſeparation, and before it could be generally and publickly known, and had taken up neceſſaries upon credit, the huſband would have been liable. If the contract with the wife had been *per ſe* an exemption to the huſband from all future liability, the huſband's caſe could not have been affected by circumſtances *ex poſt facto*. But the truth ſeems to be, that, upon the duties of the conjugal relation the law founds an implication of aſſent in the huſband to the wife's purchaſe of neceſſaries, and a conſtructive promiſe to third perſons to pay them for ſuch neceſſaries found for the wife, who have a conſequent right of action ariſing thereupon againſt the huſband, and who being conſidered by the law as having ſupplied ſuch neceſſaries upon the preſumption ariſing from the ſuppoſed relative ſituation of the married perſons, are held entitled to expreſs or conſtructive notice of circumſtances altering the oſtenſible

ſible legal predicament of the married parties (*m*).

A ſeparation by agreement muſt be conſidered as the act of the huſband, for the wife has no capacity to conſent in law to ſuch a proceeding; and as he is preſumed not to have abandoned her to want, his liability on the implied promiſe is not diſcharged.

(*m*) Cohabitation is ſo ſtrong an evidence of aſſent, that it works like an eſtoppel againſt the huſband to preclude him from denying his aſſent to her contracts for neceſſaries. If he turns her away or abandons her, he ſtill continues liable, and his aſſent will ſtill be preſumed; for the preſumption, unleſs there is a particular prohibition againſt truſting her, will flow conſtructively from his duty. It was even determined in *Bolton* v. *Prentice*, 2 Str. 1214. that if a huſband turns away his wife without cauſe he will remain ſubject to her debts contracted for neceſſaries notwithſtanding a particular prohibition. The reaſon of which reſolution, as appears in the report, was, that the huſband being a wrong doer had no right to prohibit any body; which was ſaying no more than the caſe implied. The caſe is at beſt a little anomalous and not very reconcilable with the principles laid down by the Chief Juſtices Hale and Holt. But the determination in *Bolton* v. *Prentice* appears to be brought a little more into conſiſtency with the caſes of *Manby* v. *Scott*, 1 Sid. 109. and *Etherington* v. *Parrot*, Lord Raym. 1006. if we ſupport it on the ground that the ſtrange inhumanity of the prohibition left room for ſuppoſing

charged. Where a maintenance is allowed, the huſband is *virtually* diſcharged, according to *Todd* v. *Stoakes* above cited, during the *continuance* of it, (as the caſe muſt be underſtood), if time has been given for the fact to be known; for ſuch maintenance is a performance of the implied promiſe, and as ſuch muſt affirm rather than diſcharge the huſband's liability. But ſuch ſeparate maintenance be-

---

poſing a returning ſenſe of duty in the huſband, which the law would intend rather than expoſe the wife to the danger of ſtarving. If a wife goes away with an adulterer, the huſband is diſcharged whether the tradeſmen have notice of it or not, 1 Str. 647. 706. 2 Str. 875. for though adultery *during cohabitation* does not, as it ſeems, unleſs the perſon ſuing can be proved to have had notice of it, diſcharge the huſband from his liability, 1 Salk. 119. Norton v. Fazan, 1 Boſ. and Pull. Rep. 226. by reaſon of the ſtrong preſumption above-mentioned; yet elopement and adultery together compoſe a caſe of great notoriety; and ſince, in ſuch a caſe, the relative *duties* and *rights* of marriage are deſtroyed, (for the ſpiritual court would not aſſiſt to compel a reſtitution of conjugal rights, and the right of dower would be gone at common law), there is no foundation for the implied promiſe to maintain her, but rather the contrary may be inferred. 1 Salk. 119. 6 T. R. 604. But though the huſband is not liable in ſuch a caſe, it does not follow that the wife can be ſued alone; and Blackſtone J. ſeems to have thought that the debt of the wife, in ſuch a caſe, could be recovered neither from the huſband *or* wife. 2 Bl. Rep. 1082.

ing

ing only evidence to ſhew a performance of the implied promiſe, as the *extent* of that promiſe in law is variable and relative according to the condition of the parties, it ſeems to follow that ſuch allowance can only be a virtual diſcharge of it *pro tanto* according to the fluctuating ſtandard of its relative ſufficiency. And upon theſe principles, it ſeems clear that ſuch variable meaſure cannot be fixed immutably by contract; for as the wife is not competent to charge, ſo neither can ſhe diſcharge her huſband by her deed. The law is paramount theſe private agreements. Excluſively of her huſband, a married woman cannot bind her own intereſts; ſo, on the other hand, the law has not placed the matrimonial engagements within the huſband's controul. And, having abdicated her ſeparate legal powers, a married woman can never be admitted as a feme ſole to proſecute or defend without her huſband, while the conjugal relation laſts.

Such ſeems to have been the law with reſpect to the incapacities of a married woman, until ſhaken by the deciſions of the court of King's Bench, in the time of the

late Chief Juſtice. Since the determination of thoſe caſes which were cited by Lord Coke in his Commentary (30), the abjuration, profeſſion, and exile of the huſband have been conſidered as enabling a wife to ſue and be ſued as a feme ſole, her ſituation being conſidered as a ſort of civil widowhood; but the reſolutions of the King's Bench have added to theſe excepted caſes, that of a married woman living apart from her huſband upon a ſeparate maintenance ſecured to her by deed, and have deduced this effect not from the ſufficiency of the allowance as an evidence to repel the preſumption of aſſent in the huſband, but from the ſpecific virtue of the contract itſelf. So, that the caſe of *Corbett* v. *Poelnitz* reminds us of the exclamation made by ſomebody on hearing the deciſion in Lady *Belknap*'s caſe (31), "*Ecce modo mirum fœmina fert breve regis non nominando virum conjunctum robore legis.*"

(30) Co. Litt. 132. b. 133. a.

(31) Vid. Co. Litt. 132. b.

Theſe obſervations are introduced with a due impreſſion of reſpect for thoſe Judges who decided *Corbett* v. *Poelnitz*, the object of theſe ſheets being only to bring to the view of the reader contrarient deciſions,

ciſions, and perhaps to aſſiſt him in comparing the reaſonings upon which they ſeem to have been founded. That reſpect, however, cannot prevent our ſeeing that ſubſequent caſes have been cautious of extending the doctrine of *Corbett* v. *Poelnitz* beyond the ſphere of its literal applicability; and, if the expreſſion be not too bold, have circumroded its general reaſoning till it has ſhrunk into an exception to that rule of law which it has endeavoured to ſubvert. It cannot even be ſaid, that the caſe of *Corbett* v. *Poelnitz* has *ſettled* the law within the range of its literal application, ſince the ſtrong obſervations reported to have been made by a great Judge in the caſe of *Clayton* v. *Adams* (32).

(32) 6 T. R. 605.

On the ultimate deciſion (*n*) of this queſtion as to the effect of ſuch a contract between huſband and wife, muſt de-

(*n*) The writer has been informed, ſince the laſt proof ſheet went to preſs, that the general queſtion, as to the effect in law of a contract of ſeparation and maintenance between huſband and wife, is before the twelve Judges, for their final deciſion. The caſe upon which it aroſe is *Marſhall* v. *Rutton*. If the writer had had an earlier knowledge of this circumſtance, reaſons of reſpect towards the great tribunal whoſe judgment is to cloſe the controverſy, and a ſenſe of his own inſufficiency, would have rendered him more ſparing in his remarks.

pend, as it ſhould ſeem, the propriety of thoſe determinations which before and ſince the caſe of *Corbett* v. *Poelnitz* have regarded the collateral covenant by truſtees, parties to the deed of ſeparation and maintenance, for the indemnification of the huſband, as conſtituting the valuable conſideration to ſupport it againſt creditors and purchaſers under the ſtatutes of Eliz. If the huſband and wife are good contracting parties to the effect of diſcharging the huſband from his marital obligations, and qualifying the wife to act as a feme ſole, the intervention of truſtees ſeems not to be neceſſary to perfect the conſideration ſo as to anſwer the exigency of the ſtatutes of Eliz. It was, it is true, conſidered in the caſe of *Angier* v. *Angier* above cited, that the huſband is diſcharged by the ſeparate maintenance; and it appears that an *abſolute* diſcharge, ſuch as that contended for in *Corbett* v. *Poelnitz* was there adverted to, ſince, as that caſe is reported in *Gilbert* (33), it was ſaid in effect that the covenant for indemnification was of no material uſe except as a ſecurity to the huſband againſt ſuch coſts as he might be put

(33) Gilb. Eq. Rep. 152.

put to by ſuits for his wife's debts (*o*). If ſuch a doctrine be true, the covenant for indemnification ſinks into ſome inſignificance, and is ſurely not wanted for the *ſupport* of the inſtrument; for if the huſband be completely diſcharged by virtue of his deed of ſeparation, the deed contains in its conſequences its own ſufficient conſideration, and in every ſenſe of the ſtatutes of fraudulent conveyances, is good againſt creditors and purchaſers. But except a caſe of *Hobbs* v. *Hull* mentioned by the Editor of the Treatiſe of Equity (34), where it was ſaid that a court of Equity would ſuſtain a conveyance by the huſband of part of his eſtate as a ſeparate maintenance for his wife, where there is ſufficient ground for a ſentence of alimony in the ſpiritual court, even againſt the claims of *creditors*; the caſes both at Law and in Equity have holden ſuch a covenant for ſecuring the huſband neceſſary for the *ſupport* of ſuch ſettlements againſt perſons claiming upon valuable conſidera-

(4) B. ch. 2. ſect. 6. note p.

(*o*) That the covenant for indemnity gives title to ſuch coſts, vid. 3 T. R. 374. *Duffield* v. *Scott.*

tion. And his Honour was of opinion in *Hyde* v. *Price* above referred to, that the husband was very wise in taking a covenant from trustees for his own indemnification; plainly intimating that, notwithstanding the case of *Corbett* v. *Poelnitz*, the husband was not, by his deed of separate maintenance, unfettered, at law, from his legal liabilities.

The subject seems to have been viewed in this light by Lord Hardwicke in the case of *Fitzer* v. *Stephens* (35), which was thus in effect: Catharine Adair, being entitled under the will of Lord Rivers to an annuity of 50*l.* a year for her life, charged upon the testator's lands, married Fitzer in 1726, and in 1738 they agreed to part; and by a deed of separation the husband covenanted to allow her a separate maintenance of 14*l. per Ann.* out of his own estate, and 24*l.* more to be paid to her quarterly out of the annuity of 50*l.* and 12*l. per Ann.* to their daughter. The bill was brought by the wife and daughter against the husband, and against Stephens, a *creditor* of the husband, and to whom all

(35) 2 Atk. 511.

all his eſtate, real and perſonal, had been aſſigned purſuant to the directions of an inſolvent debtor's act, to have the truſts of the deed performed. Lord Hardwicke, after having obſerved that, though the huſband is bound by law to maintain his wife and children, yet that ſtill the funds, out of which the maintenance was to ariſe, was liable to *creditors*; and having alſo remarked, that it had been inſiſted on the part of the plaintiffs, that the caſe diſcloſed a ſufficient valuable conſideration, though it had been admitted on all hands that natural affection alone was not one, but that he by no means allowed the conſideration in that caſe to be a valuable conſideration, for that if it were ſo, the huſband and wife need only agree to put ſome part of his eſtate out of his power, by veſting it in truſtees for her ſeparate uſe, in order to defraud creditors, took notice, that, notwithſtanding the deed, the wife might at any time diſavow it, and take up goods according to her rank, ſince by the proviſo it was ſtipulated that if the wife contracted debts whereby the huſband became chargeable, then the deed ſhould

ſhould be void, and there was no covenant on the part of the truſtees to indemnify the huſband, but the whole reſted upon the proviſo, that if the wife contracted debts, whereby the huſband was chargeable, the deed ſhould be void. There was, his Lordſhip obſerved, no covenant from the truſtees or relations of the wife, that the huſband ſhould not be obliged to allow her a greater maintenance, or that the huſband ſhould be diſcharged from ſuch maintenance. That the caſe was ſtill ſtronger in regard to the daughter, for that ſhe was an infant at the time the deed was executed; and that, beſides, the father by nature was obliged to maintain her. That the caſe ſtood quite abſtracted and naked from any caſes, wherein there was a covenant by the relations of the wife to indemnify the huſband againſt the debts of the wife; but that he would not determine what the conſtruction even of *ſuch* a deed would be with regard to a huſband's *creditors*. His Lordſhip therefore decreed that, upon the plaintiff, Mrs. Fitzer's, paying the defendant Stephens the remainder of his debt, Stephens ſhould releaſe all

all his right to the annuity to the truſtee of the deed of ſeparate maintenance.

The doubt, however, in which his Lordſhip left the queſtion, as to the validity of ſuch a deed againſt *creditors*, where a covenant by a truſtee for the wife to indemnify the huſband againſt the wife's debts was included in it, has been anſwered and removed by a late caſe (35), decided in the court of Chancery, where Lord Kenyon, Maſter of the Rolls, ſitting for the Chancellor, decided, that the covenant by the truſtees in the ſecond ſettlement to indemnify the huſband againſt the debts which the wife might contract after the ſeparation, was a valuable conſideration; and that, therefore, the ſettlement, though made after the debt due to the plaintiff was contracted, was good againſt him. The ſame point was ruled by Lord Loughborough in the caſe of the *King* v. *Brewer*, Chelmsford Aſſizes 1776, and may perhaps now be conſidered as at reſt.

(35) *Stephens* v. *Olive et al.* 2 Bro. C. R. 90.

SECTION XIV.

THE proviſion which a widow, on the brink of a ſecond marriage, makes for her children by her firſt huſband, deſerves the next place in this enquiry; and though the claim of a purchaſer, for valuable conſideration, ſtands on a different ground from the claim of a ſecond huſband, which latter reſts his pretenſions on no meritorious title, but on legal rights attempted to be fraudulently undermined, yet, as in the diſcuſſion of the huſband's claims, courts of Equity have looked with great jealouſy and diſcrimination into ſettlements anticipating upon the rights of huſbands, a ſhort view of the caſes wherein excluſive reſervations out of their property made by women with a general or particular proſpect of marriage, either for their own ſeparate benefit, or in behalf of children of a former marriage, have been ſanctioned or ſuperſeded in courts of Equity as affecting the rights

rights of huſbands, may aſſiſt the enquiries of the reader. Such an examination will exerciſe him on the general topics of diſtinction as to the comparative merits of theſe ſettlements under the different circumſtances which accompany them. But he is not to ſuppoſe that the conjugal relation bears an analogy to the caſe of vendor and vendee, or that the huſband is a purchaſer by the marital rights of any thing more than the legal attributes of his character (*a*). He muſt take

(*a*) Where a man makes a ſettlement upon his intended wife, he adds to his capacity of huſband the character of purchaſer, and becomes an object of particular favour in a court of Equity. As a *woman* marries in expectation of being maintained, ſhe becomes in ſome meaſure a purchaſer, by her *very marriage*, of an intereſt in ſuch property of her huſband, as he declares himſelf to be poſſeſſed of on the treaty of marriage, and in this light has been protected in Equity againſt clandeſtine agreements of the huſband, with perſons privy to the marriage, in fraud of her expectations. In *Neville* v. *Wilkinſon*, 3 P. Wms. 74. Edit. Coxe, Note. Ld. Thurlow relieved by injunction againſt a bond entered into by the plaintiff in equity to the defendant, before the plaintiff's treaty of marriage; the defendant having, by the plaintiff's deſire upon the occaſion of ſuch treaty, miſrepreſented to the wife's father, the amount of the plaintiff's debts,

take his wife as he finds her, without any authority derived from his marital character

---

debts, and, particularly, concealed from him the bond in queſtion; and it did not appear that there was any actual ſtipulation on the part of the wife's father as to the amount of the plaintiff's debts. Vid 3 P. Wms. 74. n. 1. This was an extenſion of the principle beyond the caſe of *Roberts* v. *Roberts*, 3 P. Wms. 65. edit. Coxe, wherein the wife was a purchaſer by the expreſs proviſions of the ſettlement of an intereſt in the property, which was the ſubject of the huſband's *private* agreement. The firm and liberal application of the legal maxim *ex dolo malo non oritur actio* has aſſimilated all theſe caſes under the general principle of reſiſtance made by all the courts to miſrepreſentations and clandeſtine agreements in derogation of open treaties and profeſſions, on the faith of which third perſons have been drawn into valuable conceſſions, or into acts affecting their property or perſons. The reader may have abundant ſatisfaction on this copious head by purſuing it through the authorities learnedly collected by Mr. Coxe in his note to the caſe of *Roberts* v. *Roberts*, 3 P. Wms. 74. The point in *Neville* v. *Wilkinſon*, wherein a third perſon having become acceſſary to the deception by joining in miſrepreſentations of the huſband's property, was precluded from claiming againſt his own miſrepreſentations to the diſappointment of the wife and her friends, the reader will find to be in perfect analogy of principle with the caſes of *Hobbs* v. *Norton*, Vern. 136. and *Barrett* v. *Wells*, Prec. in Chan. 131. In *Monteſiori* v. *Monteſiori*, 1 Blackſt. Rep. 363. the converſe of the rule

ex

racter to overhaul her antecedent acts, unleſs he can fix upon them the imputation of fraud as the ground of an equitable relief.

The caſes are, perhaps, not irreconcileable, though they ſeem to lie in ſome confuſion in the books of reports. *King* v. *Cotton* (1) is the leading reſolution: L. C. having ten children by her deceaſed huſband, before any treaty was in exiſtence for a ſecond marriage, ſettled ſome of her property upon herſelf during widowhood, with remainder to her ſecond ſon S. T. C. remainder over, and covenanted with truſtees to transfer ſtock, then ſtanding in her name, in truſt for herſelf during widowhood, and afterwards in truſt for her ſecond ſon; which ſtock was never transferred. The lady, afterwards, married K. her ſecond huſband, who brought his bill to have theſe ſettlements ſet aſide,

(1) 2 P. Wms. 357. 674.

ex dolo malo non oritur actio was eſtabliſhed, where it was ſaid by Lord Mansfield that no man ſhall ſet up his own iniquity as a defence any more than as a cauſe of action.

as having been made without his privity, and becauſe he was induced to marry her by her apparent ownerſhip and actual poſſeſſion of the ſettled eſtates at the time of his paying his addreſſes.

The firſt point which was thought requiſite to be eſtabliſhed for the lady was the execution of theſe deeds of ſettlement before any negotiation for the ſecond marriage had taken place; for it ſeemed to be an opinion of that time, that if, pending a treaty of marriage, a woman ſecretly put her property out of her future huſband's power, the huſband might ſet aſide ſuch ſettlement in a court of Equity, however reaſonable in itſelf. But the want of direct notice did not in that caſe enable the huſband, in the circumſtances in which he ſtood, to impeach the ſettlement as fraudulent; for though the huſband did not appear to have *notice*, every thing in the caſe tended to diſprove *diſſimulation* in the wife. The very notoriety and publicity of the tranſaction on her part, accounted for the omiſſion of *actual* notice to the intended huſband,

of the exiſtence of the ſettlement in queſtion. The meanneſs of the fortune of the ſecond huſband, and his inability to make any ſettlement or jointure, whereby he might have purchaſed a claim in equity to a full and perfect diſcloſure of his intended wife's property, her exception of a large part of her fortune out of the voluntary ſettlement on her children, which fell under his dominion by the marriage, and the retention of her own jointure, which, by exhibiting the means of an affluent ſupport without the ſettled property, repelled the preſumption of any ſecret truſts, were judged ſufficient to ſupply the omiſſion of actual notice, and to negative the inference of fraud upon the marital rights. And, in that caſe, all preſumption of fraud was ſaid to be ſo fully anſwered by the circumſtances, that if the conveyance by Lady Cotton had been made to a *ſtranger*, as a *mere voluntary gift*, the huſband could not have impeached it.

It ſeems clear, indeed, that if ſuch a proviſion or gift cannot be invalidated on

the ground of fraud, there is no purchaſing quality in the marital character which can raiſe the queſtion of voluntary and valuable in theſe conveyances which are made by a woman, before, by reaſon of any treaty of marriage begun, the rights of the future huſband can proſpectively affect her acts. In the caſe of (2) *Bowes* v. *Strathmore*, the bare circumſtance of want of notice in the huſband was not allowed to be ſufficient in itſelf to invalidate the reſervation of excluſive property by a woman, as againſt her future huſband. It ſeems to have been there held by the Judge, who ſat for the Chancellor, that *deception*, and not mere *concealment* alone, was neceſſary to ground the relief of the huſband, though circumſtances might give to the non-diſcloſure of the truth the character of poſitive fraud. Thus, as it ſhould ſeem, according to the reaſoning of that caſe, a ſufficient ſettlement made by the huſband upon the intended wife, entitles him to an explanation of her circumſtances; and in ſuch caſe an excluſive proviſion for herſelf, though not made in proſpect of the particular marriage,

(2) 2 Bro. Ch. Rep. 345. 1 Vez. Jun. 22. et vid. the remark in 2 Vez. Jun. 194.

riage, would entitle the huſband to relief in equity on the ground of fraud. And where no ſuch ſettlement is made by the huſband, yet ſuch ſecret reſervations by a woman for her own excluſive benefit, either pending an actual treaty, or in plain contemplation of a particular marriage, ſeem alſo to be conſidered by the caſe juſt referred to as unavailing againſt the huſband.

It may with truth, perhaps, be ſaid, that notwithſtanding ſome profeſſional diſcontent with the deciſion of *Bowes* v. *Strathmore*, it appears, from a view of the caſes on the ſubject, that wherever ſuch excluſive arrangements of property have been ſet aſide in equity as againſt a huſband, either an actual *ſettlement* had been made upon the intended wife, or the caſe diſcloſed evidence of an *exiſting* treaty for or proſpect of a *particular* marriage at the time of making them. Thus in *Lance* v. *Norman* (3) the recognizance there entered into by the intended wife to her brother, took place the day before the marriage. In *Howard et ux.* v. *Hooker* (4) the

(3) 2 Ch. Rep. 41.

(4) 2 Ch. Rep. 42.

the ſecond huſband had made a conſiderable ſettlement upon the wife under an erroneous impreſſion as to the ſtate of her property. In *Carleton et ux.* v. *the Earl of Dorſet et al.* (5), the conveyance by the lady is ſtated to have been made without the privity of the perſon who afterwards became her huſband; which word 'privity' cannot be underſtood in the ſenſe merely of notice, which might be ſubſequent to the tranſaction to which it related, but muſt in its true ſignification refer to a time when the ſubſequent marriage was in contemplation. It would ſeem ſcarcely correct to ſay that an act was done without the *privity* of a perſon, if that perſon had apparently no intereſt in ſuch act at the time when it was done.

(5) 2 Vern 17.

In *Poulſon* v. *Wellington* (6), where Lord King declared it as his clear opinion, that if the ſecond huſband had had no notice of the firſt deed made by the wife while ſhe was a widow, that ſuch deed would have been fraudulent and void in equity, as againſt him, it appears that a *ſettlement* had

(6) 2 P. Wms. 533.

had been made by the huſband. And ſo ſtrong is the equity of the huſband, which is raiſed by an actual ſettlement, that we perceive in *Poulſon* v. *Wellington*, that, though the deed of the intended wife was made for the apparent purpoſe of ſecuring a certain proviſion for the children of a firſt marriage, the reaſonableneſs of the object was held not to repel the huſband's claim, ariſing from the *purpoſed* concealment of a fact from his knowledge, which he had purchaſed by his ſettlement a right to know.—A deciſion fortified by the legal maxim, that a fraudulent act ſhall never in any way inure to the benefit of thoſe who claim under it. For although, where no *actual* deceit is proved, the proviſion for children may, in theſe caſes, be evidence of honeſt intention, yet it ſeems clear that the innocency of the act itſelf, and not the *merits* of thoſe claiming under it, is the true ground on which it muſt be ſupported againſt the marital claims of the ſecond huſband.

No preſumption, indeed, of *original* fraud can attach upon the mere neglect of

notice, where a motive ſo reaſonable and juſt as a proviſion for a firſt family appears to explain theſe proſpective ſettlements. But yet if, after ſuch juſtifiable proviſion has been made, the intended huſband is ſuffered, under an erroneous conception of facts, and under the impreſſion of a falſe expectation founded on ſtudied appearances, to make an ample ſettlement on his intended wife, he ſeems according to the caſe of *Howard* v. *Hooker* above cited, and the opinion of the court in *Poulſon* v. *Wellington*, to be entitled to relief againſt the act of the wife, as being done in the ſpirit of diſhoneſt diſſimulation, and in palpable derogation of the marital rights. It ſeems, however, that, notwithſtanding the exiſtence of an actual treaty for a ſecond marriage, ſuch a ſettlement by a widow on the children of her firſt marriage cannot be impeached in equity, if no falſe appearances have been ſtudiouſly held out to the intended huſband, to induce him to make a ſettlement. This was the effect of the deciſion in *Hunt* v. *Matthews* (7), where it was ſaid by the court, that a widow might with good conſcience,

(7) 1 Vern 408.

conſcience, before ſhe put herſelf under the power of a ſecond huſband, provide for the children which ſhe had by the firſt.

So that upon the whole, if the reſult of theſe caſes may be relied on as furniſhing fixed criteria for future adjudications, we ſeem to be warranted in holding, firſt, that where a ſingle woman reſerves by deed, before any treaty of marriage is in exiſtence, an excluſive dominion over her own property, with a general view to her poſſible coverture, the huſband, if he has made no ſettlement upon her, will not prevail in a court of equity to ſet aſide ſuch proviſion. Secondly, that by making a proper ſettlement, he has purchaſed a right to a diſcloſure, and a meritorious title to relief in equity, on the ground of fraud, inferible from the want of notice under ſuch circumſtances. Thirdly, that, if the ſettlement by the woman, though in contemplation of a ſecond marriage, and pending an actual treaty, be made for the ſupport of her children by a prior marriage, the reaſonableneſs of the end will legalize the means, and eſtabliſh ſuch a ſettlement in equity againſt the claims of the ſecond

husband, notwithstanding the want of his privity and consent. But fourthly, if a settlement by the husband has been induced by a *purposed concealment* of such provision for the children of a former marriage, and by studied appearances contradicting the truth, the merits of the persons claiming the benefit of such provision shall not prevail to effectuate a deceit in derogation of the marital rights. The favour shewn in the case of *Hunt* v. *Matthews* to a settlement made by a widow, in prospect of a particular second marriage, upon her children by her former marriage, has, by subsequent authority, been carried to the extent of supporting it against a purchaser for valuable consideration. And the *dictum* of the judge in *Bowes* v. *Strathmore*, by which a contrary doctrine is intimated, is opposed to the opinion of Lord Hardwicke in the case of *Newstead* v. *Searles* (8). Perhaps, too, if the opinion which Lord Hardwicke is reported to have given in *Newstead* v. *Searles* is to prevail, we might suppose cases wherein those circumstances of dissimulation, which would invalidate the sort of settlement we have been considering

(8) 1 Atk. 265.

ing as againſt the rights of a ſecond huſband, would have no influence to the prejudice of the objects of ſuch ſettlement in a conteſt with a valuable purchaſer; for the *original conſideration* of the ſettlement, abſtracted from any queſtion of fraudulent concealment, (by which, as it ſeems, a ſettlement proper in itſelf might be ſet aſide as againſt a ſecond huſband), becomes the deciſive point of litigation, where the ſettlement is impeached by a purchaſer for valuable conſideration. But if ſuch a ſettlement made by a widow, in contemplation of a ſecond marriage, for the ſupport of her children by a firſt, as in *Hunt* v. *Matthews* was ſupported againſt a ſecond huſband, be good againſt a purchaſer for valuable conſideration, it is an inſtance of a relenting conſtruction of the ſtatute in behalf of a conveyance with a very *doubtful* tincture of valuable conſideration, out of extraordinary regard to the peculiar exigencies of the object to be anſwered by it. The reaſonings and poſitions of Lord Chancellor Hardwicke in the above cited caſe of *Newſtead* v. *Searles*, certainly go to a great length; but the caſe itſelf does not ſeem

to

to have raiſed the naked queſtion as to the validity of a mere ſpontaneous proviſion by a widow on her ſecond marriage upon the iſſue of the firſt; for this particular caſe, (which aroſe upon an application to the court by the iſſue of a firſt marriage, after the death of their grandmother, who had married a ſecond huſband, to obtain a ſpecific performance of articles made in their favour on the treaty for the ſecond marriage, to which end a bill had been filed againſt the ſurviving huſband and a mortgagee who claimed under a fine levied to him by the ſecond huſband and his wife), beſides affording a plain ground for inferring notice to the mortgagee of the exiſting articles, turned, as his Lordſhip thought, upon *reciprocal* conſiderations on the part of the huſband and wife, by reaſon of the proviſion under the articles for the children of the ſecond marriage. It appears, however, upon a cloſer examination into particulars, that there wanted an authentic conſideration of a *valuable* kind, in the caſe of *Newſtead* v. *Searles*; for though the proviſion for the widow's firſt family, by being blended with the

the limitations to the children of the ſecond marriage, (which undoubtedly reſted upon valuable conſideration), ſeemed in ſome ſort to partake of the ſame valuable ſupport, yet in truth, the ſecond huſband who was a contractor by his marriage for the limitations to the children of his own body, could not without great violence be conſidered as a purchaſer for the children of the former huſband: and it may ſeem a conſtruction not much more reconcileable to ſenſe, to regard the wife, from whom the whole property moved, as a purchaſer for her own children out of property under her free diſpoſal at the time. There is however a clear diſtinction between ſuch ſettlements made, on a ſecond marriage, upon children by a firſt, where a *woman* is the ſettler, and thoſe which the intended *huſband* of a ſecond wife may make for ſimilar objects, as to the force of the conſideration by which they may reſpectively be ſuppoſed to be induced. Thus in *Newſtead* v. *Searles* above mentioned, where part of the property of the intended wife was freehold, and part leaſehold, and the limitations contained in the articles made upon

upon her ſecond marriage, to the iſſue by her firſt marriage, involved a ſacrifice by the ſecond huſband of his poſſible future right to a tenancy by the curteſy as to the freehold, and of his poſitive future power of alienation as to the chattel real, the wife in ſuch contract might perhaps be ſaid, with a little refinement of conſtruction, to have purchaſed th proviſions for her own children out of the anticipated rights of her ſecond huſband.

We muſt not forget too that in *Newſtead* v. *Searles* the court did not compel an execution of the articles to the prejudice of *that* part of the claim of the mortgagee which was unaffected by notice, ſo that an equitable principle independent of the ſtatute 27th Eliz. ſeems to have been at the bottom of the deciſion of that caſe; for as appears by the before cited caſe of *Evelyn* v. *Templar*, whether notice or not, cannot be a queſtion even in a court of Equity, where the ſimple operation of the ſtatute is the ground of the determination, as it muſt be in thoſe caſes, where a legal executed ſettlement and ſubſequent ſale have

attracted the application of the general law ariſing upon the ſtatute. Upon the whole though this caſe was a little ſtrained in the uſe made of it in *Doe* v. *Routledge*, yet it muſt be admitted to afford a ſtrong ground for conſidering theſe ſettlements by widows, made in contemplation of a ſecond marriage, upon the children by a former marriage, as protected by their peculiar merit and palpable motives from the claims of a ſubſequent purchaſer for valuable conſideration. On the other hand it ſhould be remembered that *Newſtead* v. *Searles* was a *mixed* caſe, upon which the letter of the ſtatute did not attach in law, and which allowed room for the influence of general equity; and at moſt perhaps, when clearly underſtood, it is an inſulated caſe (*b*); and, with due ſubmiſſion, very diſtinguiſhable from the caſes of *Jones* v. *March* and *Roe* v. *Mitton*, with which the judgment in *Doe* v. *Routledge* has blended its principle.

(*b*) There is, however, in the Touchſtone, p. 67. a caſe which is there called *Millar* and *Pott's* caſe, determined 19 Jac. Co. B. which, though very obſcure, and ſhortly ſtated, ſeems to turn upon a principle analogous to [redacted] of *Newſtead* v. *Searles*.

CHAP. IV.

SECTION I.

WHAT has been ſaid may ſerve to raiſe the reader's curioſity, perhaps to aſſiſt his induſtry, as to that part of the enquiry which regards voluntary and valuable *ſettlements*. The proſpect becomes ſomewhat clearer as we turn our attention from ſettlements to ſimple conveyances made to ſtrangers. The irregular impulſe of compaſſion, where the proviſion for a wife or children has been in diſpute, has created an unſteadineſs of deciſion, by which conſiſtency has been violated, and practice endangered. It has ſometimes in theſe queſtions been forgotten, that the beauty of private tenderneſs is the deformity of a ſyſtem, whoſe perfection is certainty; and that although pity is interwoven in the frame of the Engliſh law, yet that occaſional compaſſion may be inconſiſtent with its general beneficence. In ſimple conveyances

ances therefore, which leſs attract the influence of compaſſion, the judicial conſtruction of theſe ſtatutes has been pretty uniform.

Before we proceed further, it may be proper in this place to add ſome obſervations on the perfect conſideration of value (*a*) and perfect integrity of dealing, neceſſary on the part of the purchaſer. And firſt, it may be obſerved, that the valuable conſideration need not be ſuch a conſideration, as is neceſſary to give effect to a bargain and ſale. *Marriage* is a ſufficient qualification to take advantage of the ſtatute 27 Eliz. (*b*). Thus in a caſe (1) where A., after his marriage, and in the lifetime of his firſt wife, had ſettled the manors of Buttles and Payton Hall to the uſe of himſelf for life; remainder to his firſt and other ſons in tail; and after the death of the firſt wife without iſſue, had married B. a

(1) *Douglaſs v. Ward*, Chan. Caſ. 99.

(*a*) See the comment in 2 Atk. 601. and 3 Rep. 83. on the diſtinct operation of the words *paid* and *given*.

(*b*) The words of the ſtatute are "which have purchaſed or ſhall purchaſe for money or other *good* conſideration."

ſecond

ſecond wife, but before his ſecond marriage, in conſideration thereof, and of 1000 *l.* portion, had agreed with the father of B. to ſettle upon her a jointure, and to ſecure it upon certain lands, (of which it appeared that the manor of Buttles was to be part), and died, leaving iſſue by B., his ſecond wife, one ſon, the defendant, and alſo B. who ſoon after married C. the plaintiff, upon a bill brought againſt the defendant to compel him to ſettle the jointure on his mother, and to ſet aſide the firſt ſettlement made by A. as fraudulent, though there was no proof that the portion was paid, and though it was inſiſted that there could be no intention of fraud againſt the ſecond wife, and that the firſt ſettlement was by fine, and ſo *notorious* and upon record, yet the court declared that the marriage was a good conſideration to make the wife a purchaſer, and decreed the ſettlement by A. to be ſet aſide as fraudulent. It appears that the defendant brought a bill of review, and aſſigned for error, that it was not cognizable in equity, whether or not a deed be fraudulent within the ſtatutes of Eliz.; and beſides

beſides that there was no colour of fraud againſt the jointreſs, for the deed was made in the life of the firſt wife, who lived ten years after, and the ſecond wife of courſe was not then thought of; and moreover, that the ſettlement being by deed and fine ought not to be preſumed fraudulent without proof; but on demurrer to this bill of review, the decree was affirmed as to the above points. We may collect clearly from *Twine's* caſe (2), that nothing leſs than a valuable conſideration will avail to overthrow a precedent voluntary deed; nor is there any caſe to ſhew that even a *bona fide* conveyance to a truſtee for payment of debts will have this effect. It appears indeed from ſeveral caſes (3), that where a man has made a voluntary ſettlement upon himſelf for life, with a limitation to truſtees to ſupport contingent remainders, remainder to his firſt, &c. ſon in tail, remainder to himſelf in fee, and the ſettler has ſubſequently conveyed the lands to a truſtee for the payment of his debts, the creditors have not relied upon the effect of this conveyance under the ſtatute of Eliz. but have carried their caſe into the court of Chancery, to obtain a decree of

(2) Rep. 81.

(3) See *Buſſet* v. *Clapham*, 1 P Wms. 357. and Mr. Coxe's note.

that court to compel the truſtees for preſerving contingent remainders, to join in a ſale to deſtroy the contingent remainders.

It may be as well again to impreſs upon the recollection of the reader, that except in the caſe above conſidered, of a ſettlement upon a ſubſequent marriage, the purchaſer to take the benefit of this ſtatute againſt a precedent voluntary conveyance or ſettlement muſt be a *bona fide* purchaſer, not in *legal*, but in vulgar and common intendment; for where a parent advances his children, ſuch children are in the language of courts, more particularly of the court of Chancery denominated purchaſers, and yet a mere voluntary conveyance to a perfect ſtranger, will ſtand as againſt ſuch purchaſers. Thus H. B. being ſeiſed of the manor of B. by indenture covenanted with L. D. for the advancement of ſuch heirs male, as well thoſe which he had begotten, as thoſe which he ſhould beget on the body of Mary, then his wife (ſiſter of L. D.) to levy a fine of the ſaid Manor to the uſe of the ſaid H. B. for life, and afterwards to the uſe of the eldeſt iſſue male of the bodies

bodies of the ſaid H. B. and Mary begotten in tail, &c. and ſo to three iſſues of their bodies ſucceſſively, remainder to the right heirs of the ſaid H. B. and afterwards, and before the fine levied, made a leaſe of the ſaid manor for a long term of years to R. H. and then levied the fine in purſuance of his covenant. The caſe being ſent out of Chancery for the conſideration of the Judges, it was reſolved, that although the iſſue was a purchaſer, he was not a purchaſer in vulgar and common intendment (4). The ſame rule holds with reſpect to a jointreſs (5) after marriage, who is incapable of averring fraud upon theſe ſtatutes of Eliz.

(4) 3 Rep. 83. b. 2 And. 233. *Nedham* and *Beaumont*'s caſe.

(5) See the caſe related by Beamond, J. in *Upton* v. *Baſſet*, Cro. Eliz. 445.

In attending to the requiſite qualifications of a purchaſer within the ſtatute 27 Eliz. the ſtudent muſt be cautioned againſt ſuppoſing that mere inadequacy of price is objection ſufficient (6). Where it has prevailed as an objection, it has generally been coupled with corroborating circumſtances of evidence, (in which light *notice* may be of importance), indicating contrivance and colluſion between the ſeller and purchaſer

(6) Finch. 104.

to overturn the precedent conveyance. It is not, however, neceſſary, that there ſhould be ground to ſuſpect contrivance between the ſeller and purchaſer, as in *Doe* v. *Routledge*; for where there were circumſtances tending forcibly to ſhew that the ſeller had been over-reached in the bargain, by an advantage taken of his notorious weakneſs and indiſcretion, a former conveyance to truſtees to hold in truſt, and to manage for the ſeller (*t*), was ſupported againſt the ſecond conveyance, for which an inadequate price had been given (7).

(7) Vid. 3 Rep. 83. b. the caſe related by Anderſon, C. J.

(*t*) Yet it was remarked by the Chief Juſtice, who related the caſe alluded to, that ſuch a conveyance made on truſt, would be void as to him who ſhould purchaſe the land for valuable conſideration *bonâ fide*; which is a ſtrong inſtance of the ſevere ſenſe into which the lawyers of that day conſtrued the ſtatute againſt voluntary conveyances; for what fraud, in the vulgar underſtanding of the word, could rationally be imputed to one who was proved to have confided his property to his friends, on account of his own mental infirmity, to manage for his benefit? And here we obſerve, that not merely the truſt or beneficial intereſt of the vendor would have been carried by the conveyance to the purchaſer, but the legal eſtate, under the avoiding conſtruction of the ſtatute.

It

It has always been held that groſs inadequacy (*d*) amounting only to a colourable conſideration is ſingly ſufficient to negative the pretenſions of a purchaſer to the benefit of the ſtatute.

It is not, however, only to the abſolute and peremptory purchaſer, that the protection of the act is extended. A mortgagee is a purchaſer, againſt whom a former voluntary conveyance cannot be maintained (8); although a mortgagee is only a purchaſer in equity to the extent of his ſecurity for a voluntary conveyance is good to carry the equity of redemption, whether made before or after the mortgage (9). But it ſeems a court of Equity will not open a foreclosure in favour of a ſubſequent voluntary alienee (*e*); and it ſeems by

(8) Skin 423. Holt 477. 2 Vern. 272. and ſee the obſervation of Aſton, J. in *Doe* v. *Routledge*, Cowp. 713. See alſo Chan Ca. 220. and Amb. 289. per Lord Hardwicke.

(9) Chan. Ca. 59. *Rand* v. *Cartwright*.

(*d*) It has been ſaid, that the reaſon why a court of Equity will not relieve againſt marriage contracts, though they are very unequal, is, becauſe they cannot ſet the huſband and wife in *ſtatu quo*, and unmarry the parties. Vid. *North* v. *Anſell*, 2 P. Wms. 618. per Sir J. Jekyl.

(*e*) Chan. Ca. 217. *et ſeq.* and vid. *Thorne* v. *Newman*, 3 Finch. 38. where the relief ſeems a little extraordinary,

by the above cited caſes of *Beverley* v. *Gatacre* (10) and *Scott* v. *Bell*, that a ſurety to whom a leaſe of lands is made for his indemnification by the perſon for whom he is ſurety, is a purchaſer within this ſtatute (*f*); but this is extremely doubtful. We may add to theſe obſervations reſpecting the requiſites neceſſary to qualify a purchaſer within this ſtatute, that it has been determined, that the purchaſer muſt contract for the identical thing which was

(10) 2 Roll. Rep. 305. 1 Lev. 70.

---

as allowing a fraudulent grantee under the ſtatute, to redeem againſt a mortgagee, who had ſince the mortgage purchaſed the land.

(*f*) It is ſaid, however, that a grant by one to a ſurety before he hath paid any money, is not good againſt the commiſſioners of bankrupt, by ſtat. 1 Jac. c. 15. becauſe not a valuable conſideration within that ſtatute; and ſee the caſe of *Cartwright* and *Dent* v. *Underhill*, Dyer 205. a. in note. But ſee Broughton's caſe, 5 Rep. 24. In the caſe of *Franklin* v. *Bradell*, Hutt. 84. it was ſaid, that a man's having been a ſurety for another, was a good *ex poſt facto* conſideration to raiſe an aſſumpſit; ſee, however, the caſe of *Legard* v. *Linley*, Clayt. 38. where ſuch a deed of indemnification to a ſurety was held fraudulent and void againſt ſpecialty creditors in the court of Chancery; and vid. 2 Roll. Abr. 783. adjudged between *Ward* v. *Lumbard*, that it is not a good conſideration to raiſe the uſe upon a bargain and ſale.

the

the ſubject of the fraudulent conveyance, or he is not an object of protection. Thus, where J. C. (11) having a leaſe of certain lands for 60 years if he lived ſo long, forged a leaſe for 90 years abſolutely; and afterwards by indenture reciting the forged leaſe, for valuable conſideration, bargained and ſold the forged leaſe *and all his intereſt in the land* to R. G. Ld. Coke and all the other Judges were of opinion, that R. G. was no purchaſer within the ſtatute 27 Eliz. for he did not contract for the true and lawful intereſt, for that was not known to him, and if it had been known to him, perhaps he would not have dealt for it, and the viſible and known term was forged. It was agreed, however, that the true intereſt did paſs by force of the general words; but it was not included in the contract, nor did the valuable conſideration extend to it.

(11) Co. Litt. 3. b.

Thus it ſeems to have been thought in this caſe, that the valuable conſideration could only be extended to that particular intereſt, which it was in the contemplation of the purchaſer to buy. If, however, there be, in truth, a valuable conſideration given, it

matters not what *ſort* of eſtate or intereſt is the ſubject of the purchaſe. And it appears to have been reſolved, upon this ſtatute, that even where no actual eſtate or intereſt is contracted for, but only an acceleration of the right of poſſeſſion, as where a leſſee for years grants over his eſtate fraudulently, with intent to deceive purchaſers; and afterwards the reverſioner, not being conuſant of it, bargains with the leſſee for a ſurrender of the term, and gives a valuable conſideration for it, and the leſſee by parol or deed ſurrenders all his eſtate, the reverſioner is aided by the ſtatute 27 Eliz. although he does not purchaſe the land in fee-tail, nor for life or for years, according to the words of the ſtatute, for he purchaſes no eſtate, but the *extinguiſhment* of an eſtate. And this point is ſaid to have been decided the ſame year, in which the ſtatute was made, and is cited in ſome old books from Juſtice Warburton's reports.

The caſe of a leſſee or purchaſer of a term of years is clearly enough embraced within the principle of the foregoing deciſions. Accordingly in *Shaw* v. *Standiſh*, (12) and *Goodright* v. *Moſes* (13) it was unanimouſly

(12) 2 Vern. 327.
(13) 2 Black. 1019.

unanimouſly held, that a leſſee at rack-rent is a purchaſer of his term for a valuable conſideration within the ſtatute 27 Eliz. and in the caſe of *Croſs* v. *Fauſtendieh* (14) the ſame privilege was allowed to a leſſee who had paid a fine, as the conſideration of his leaſe; and in the ſame caſe it was ſaid at the bar to have been reſolved in 29 Eliz. in a caſe between *Hinde* v. *Collins*, that a fraudulent conveyance might be avoided as againſt a leaſe, whereupon rent is reſerved without any other conſideration.

(14) Cro. Jac. 187.

Much caution is neceſſary on this head of enquiry. It is a point of almoſt as much nicety to aſcertain who ſhall be a proper purchaſer, as what conveyance ſhall be fraudulent within this ſtatute. In one place (15) we find it laid down that "he who makes a fraudulent gift within the ſtatute, muſt be the ſame perſon that afterwards makes ſale of the lands." But in *Burrell*'s caſe (16), it is ſtated as a point reſolved by the Judges, that "it is not neceſſary that he who ſells the land, ſhould make the former fraudulent eſtate; but if the

(15) Gilb. Uſes 312.

(16) 6 Rep. 72 b.

the eſtate be fraudulent, *whoever* ſells it, the purchaſer ſhall avoid ſuch fraudulent eſtate." A poſition, which if taken without ſome qualification, is a little too large in expreſſion. But there is a caſe (16) in Vernon, which on a ſuperficial glance might ſeem to lend ſome ſupport to the obſervation firſt above adverted to; though that ſupport vaniſhes upon cloſer inſpection. That caſe was in effect thus—grandfather, father, and ſon. The grandfather made a voluntary ſettlement upon his grandſon and died. The father afterwards made a mortgage of the ſettled lands, and then the voluntary ſettlement was ſet up by the ſon againſt the father's mortgagee. The court held clearly, that the voluntary ſettlement ſhould not be affected by the mortgage; but if the ſettlement had been made by the ſame perſon who mortgaged the land, it ſhould not prevail againſt a purchaſer. But here we muſt take notice, that the eſtate actually *paſſed* from the grandfather to the ſon by the voluntary ſettlement, for it was without doubt a good conveyance, until the mortgagee's title aroſe, and as it paſſed to the ſon, nothing deſcended

(16) 2 Vern. 45. *Jones. v. Purcſoy.*

ſcended to the father, ſo that when he attempted to make this mortgage, he had in fact nothing to convey. He was heir at law, as was the ſeller in *Burrell's* caſe, with this difference, that the ſeller in *Burrell's* caſe had the inheritance *in* him at the time of the ſale; whereas, here the mortgagor, notwithſtanding he was heir, was a mere ſtranger in intereſt at the time of the pretended mortgage. So that this caſe in Vernon does not warrant the extent of the poſition, that the perſon making the fraudulent conveyance, and ſelling the land, muſt neceſſarily be the ſame.

In *Burrell's* caſe the grandfather made a fraudulent leaſe for a long term of years to the father. The father aſſigned over the leaſe to his ſon to prevent its being merged by the deſcent of the reverſion; and both the leaſe and aſſignment contained peculiarities which were conſidered as ſtrong indications of fraudulent intent. After the death of the grandfather, the father ſold the land to a purchaſer for valuable conſideration, and covenanted that the

the ſame was clear of all leaſes, &c. and it was determined that both the leaſe and aſſignment were void againſt the purchaſer. This was the ſubſtance of the caſe. Now here we obſerve, that the fraudulent act, by which the purchaſer was immediately deceived, was the aſſignment by the father; for if that aſſignment had not been made, the term would have been drowned in the inheritance. We ſee alſo that the father had the fee ſimple of the land at the time of his conveyance to the purchaſer. But to give the ſtatute its full beneficial operation, both the original leaſe and the aſſignment were adjudged fraudulent againſt the purchaſer. With reſpect to the avoidance of the aſſignment, it was only the common caſe, for ſo far, the perſon making the fraudulent conveyance was the ſeller; but if the aſſignment only had been avoided, it might, perhaps, have been doubted, whether the effect of the ſtatute rendered it ſo abſolutely void to every intent as to let the reverſion in upon the leaſe ſo as to operate a merger of it, though there ſeems good reaſon for ſaying, that, if it had been neceſſary, the effect

effect of the ſtatute ought to have been ſo conſtrued in furtherance of its general object (*g*); but the court gave the ſtatute a more ſweeping operation, and conſtrued both the leaſe and aſſignment as fraudulent within its purview; and as the reſult of that deciſion they laid down a rule of conſtruction, which imported, that, if the

(*g*) It ſeems always to have been the learned ſenſe entertained of theſe ſtatutes, that they render conveyances void to ſuch purpoſes, vid. Hob. 166. and to ſuch extent as may be neceſſary to accompliſh their object. The conſtruction adopted has been the *rei gerendæ aptior*. If a merger be *neceſſary*, in any inſtance, to their efficacious operation, as it might have been in *Burrell's* caſe, if the ſtatute had been conſtrued only to operate on the aſſignment, they muſt be taken, as it ſhould ſeem, to cauſe an avoidance to the extent of effectuating the merger. On the other hand, in the caſe of *Thorne* v. *Newman*, 2 Chan. Rep. 37. where an eſtate of freehold under a voluntary deed was attempted to be ſet up in the perſon from whom the leaſehold eſtate had been purchaſed, whereby it was, contended that the chattel intereſt was merged, and ſo not in exiſtence to paſs by the aſſignment to the purchaſer, ſuch voluntary conveyance was declared to be void, both at law and in equity, againſt the purchaſer of the leaſe, and the merger (if a merger it could be, vid. the caſe, and compare it with *Platt* v. *Sleap*, Cro. Jac. 275.) was conſequently ſuſpended.

aſſign-

aſſignment by the father had been out of the caſe, and the original leaſe had been made by the grandfather to a ſtranger inſtead of the father, the ſale by the father of the whole eſtate in the land, after the reverſion had deſcended upon him, would have rendered the grandfather's leaſe a nullity as againſt ſuch purchaſer from the father.

It ſeems, therefore, that we are ſafe in ſaying, that it is unneceſſary that the perſon who ſells ſhould be the ſame perſon who made the fraudulent conveyance, provided the ſeller has the eſtate in him to convey. But if A. makes a fraudulent conveyance within the ſtatute, and then attempts a ſecond time to convey the ſame land for the ſame eſtate (*b*) without a valuable

(*b*) The words "for the ſame eſtate" are added in the text, becauſe, where a man makes a fraudulent conveyance of a particular eſtate, and then conveys the reverſion and inheritance to B. a third perſon, and B. ſells to a purchaſer, who gives a valuable conſideration for the unincumbered immediate poſſeſſion, ſince B. had an eſtate in him to convey, though not ſuch as he undertook to convey, it may be doubted whether the pur-

luable conſideration; and then the ſecond grantee ſells to a purchaſer for valuable conſideration, ſuch purchaſer is not a purchaſer within the ſtatute to avoid the firſt voluntary conveyance; for he to whom the ſecond grant was made took no eſtate, and his ſale being inefficacious as the act of a ſtranger, would fall within the principle of the caſe of *Jones* v. *Purefoy* above cited. Thus where A. (18) ſeized in fee of land bargained and ſold it to B. and C. with power of revocation upon the tender of 20 *s.* and before an effectual tender made, ſo as to revoke the firſt conveyance, covenanted to ſtand ſeized of the land to the uſe of P. his nephew, for his advancement in life, who, after the deceaſe of A. ſold it to J. S. it was re-

(18) *Dame Burgh's* caſe, Moor 853.

---

purchaſer ſhould not hold diſcharged of the leaſe. And it may be queſtioned whether ſuch a caſe can be diſtinguiſhed in principle from *Burrell's* caſe above cited, where the father, after making ſuch a leaſe, had ſuffered the land to deſcend to his eldeſt ſon, and the leaſe was adjudged void as againſt the purchaſer of the entire inheritance from the eldeſt ſon. And ſee the caſe of *Clerk* v. *Rutland*, Lane 113.

ſolved by all the Judges, that the conveyance to P. could not make void the firſt conveyance, and the ſubſequent ſale was regarded as dependent on that previous queſtion.

To make the ſtatute extend to avoid the fraudulent leaſe made by the grandfather in *Burrell's* caſe, it was neceſſary to found the rule of interpretation upon a ſtrong preſumption of law. For as the *grandfather* made the fraudulent conveyance, and the *father* ſold to the purchaſer, the father was not within the verbal import of the ſtatute which ſpeaks of fraudulent conveyances with intent to deceive purchaſers; for how could the fraud of the grandfather be coupled with the act of the father? The identity of the agent is, in ſtrictneſs, neceſſary to the accompliſhment of what the ſtatute regards as *one* act of fraud, nor can we ſeparate in *idea* the intent from the act without deſtroying the very *eſſence* of fraud; but the grave and vigorous expoſitors of that law, labouring by artificial preſumption to

draw out the efficacy of its general clauſes to the utmoſt ſtretch of its purview, choſe rather to hazard a ſoleciſm than to leave to fraud one hope of evaſion. They reſolved, therefore, that the perſon who actually purchaſed was the perſon intended to be deceived, and in their nervous idiom they declared that "for as much as it is intended and preſumed in law, that every fraudulent leaſe is made to the intent generally to defraud purchaſers, farmers, &c. within this generality every particular purchaſer and farmer is included." It ſhould be obſerved alſo, that the court would not allow it to be a material queſtion, whether the ſeller be conuſant (*i*) or not of the former fraudulent leaſe.

In *Burrell*'s caſe above cited we obſerve, that the perſon ſelling, though a different perſon from him who made the voluntary conveyance, yet was *in* by title in *privity* of eſtate, and the power of defeating a former fraudulent conveyance, ſeems

(*i*) The caſe, as to this point, ſeems to have been miſapprehended in the ſtatement of it in Lane 113.

to bound itſelf within this limit. Thus in the caſe of *Hunt* v. *Gateley* (19), where a perſon in remainder after an eſtate tail made a voluntary grant of rent, and then tenant in tail ſuffered a common recovery in favour of a purchaſer for valuable conſideration, it was contended that the grant was fraudulent and void as againſt the purchaſer within the ſtatute 27 Eliz. But this the Juſtices all denied; and were very clear in opinion that the voluntary grant ought, in that caſe, to have been made by him who made the ſale. Though they were equally clear on other grounds that the rent was deſtroyed by the recovery. And a ſtill ſtricter notion prevailed in the caſe of *Clerk* v. *Rutland* (20), where a father made a leaſe to a ſtranger for forty years, and continued in poſſeſſion, and afterwards conveyed the lands to a younger ſon, who ſold it for a valuable conſideration, it was doubted whether the purchaſer could avoid the leaſe; but it was ſaid, that if in that caſe the father, after making ſuch leaſe, had ſuffered the land to *deſcend* to his eldeſt ſon, then the purchaſer from the eldeſt ſon ſhould avoid the leaſe.

(19) Moore 358.

(20) Lane 113.

When this enquiry into the merits and qualifications of a purchaſer to entitle him to the benefit of this law, brings us to the doubtful point at which voluntary and valuable conſiderations begin to divide, we muſt attend to the ſame diſtinctions as are neceſſary in conſidering the availableneſs or inſufficiency of the firſt conveyance as againſt a ſubſequent purchaſer. Though the precedent conveyance ſhould be fraudulent under every clauſe of the ſtatute, the ſtatute only avoids it againſt a purchaſer of a certain deſcription; and though a purchaſer be ever ſo fortified in his value and integrity, there is a certain degree to which the negative or poſitive indications of fraudulent intent muſt amount before the prior conveyance is annulled by the ſtatute. The tendency, or if the expreſſion will be allowed, the propenſity of the law to uphold rather than deſtroy, though it may not enervate the ſtatute by mitigating its conſtruction againſt conveyances or gifts without conſideration where the ſubſequent purchaſe is clear from ſuſpicion, may yet reaſonably induce a ſome-

what more jealous enquiry into the merits of thoſe who demand the deſtruction of ſubſiſting titles. It is a diſtinction, however, to be cautiouſly admitted, and only, perhaps, where caſes hang upon a nice balance of conſiderations. It is ſettled beyond doubt, that only a valuable conſideration will ſupport the pretenſions of a perſon who attempts to found a title upon this ſtatute in derogation of an antecedent ſettlement or conveyance. But it may be doubted whether that conſtructively valuable conſideration which has in ſome caſes ſingly prevailed, in others cumulatively tended to ſupport precedent conveyances againſt ſubſequent purchaſers, will arm the purchaſer againſt a prior voluntary deed with power ſufficient to overthrow it. That *ex poſt facto* ſort of conſideration which has had more or leſs weight in the caſes of *Prodgers* v. *Langham* (21), *Kirk* v. *Clark* (22), *the Eaſt India Company* v. *Clavel* (23), and in *Doe* v. *Routledge*, could hardly, it is conceived, prevail in a court of law or equity as a foundation for the claim of a ſubſequent grantee againſt an exiſting voluntary title, for this would

(21) Sid. 133.
(22) Prec. in Chan. 275.
(23) Prec. in Chan. 377.

would be to infer the proſpective fraud within this ſtatute with too much violence of technical conſtruction.

It ſeems clear, upon principle, and agreeable to all the determinations of the court of Chancery, that a truſtee, appointed under a voluntary ſettlement, cannot become a *bona fide* purchaſer, ſo as to diſſolve the connection between himſelf and his *ceſtui que* truſts; if he is truſtee of the fee ſimple, he cannot, by paying a full value, deſtroy his character of truſtee; neither, as it clearly ſeems, can ſuch truſtee of a term only, by the purchaſe of the fee, extinguiſh his term in equity. And if a truſtee, with the particular direction of his *ceſtui que* truſt, make a voluntary conveyance, he cannot afterwards, without the direction of his *ceſtui que* truſt, defeat ſuch voluntary conveyance by his ſubſequent ſale to a valuable purchaſer without notice, (if the purchaſer have notice he is implicated in the breach of truſt, and ſo not a *bona fide* purchaſer) (*k*), for the

(*k*) This ſeems to have been the reaſon of the decree in *Aldridge* v. *Duke et al.* Fin. Rep. 439.

firſt conveyance did not originate in any movement of his own mind, or of the mind of any one under whom he claims; and as the latter conveyance ſuppoſes a plain breach of truſt, it is not only diſconnected with, but oppoſed in intereſt to the firſt conveyance. This was the caſe of *Sheldon* v. *Hanbury* (24), where A. a woman, living ſeparate from her huſband, had ſaved money, and purchaſed in B.'s name in truſt. B. lying ill, made a leaſe *at the requeſt of A.* for 200 years to C. on condition that C. ſhould pay the profits to A. and alſo on condition that if B. ſurvived the firſt day of June, and then paid 1 *s.* to C. the leaſe ſhould be void. B. ſurvived the day, but did not pay the ſhilling. Afterwards B. in *conſideration of* 100 *l. made a leaſe to J. S.* with covenants for quiet enjoyment, &c. B. died. C. having notice given him now, and not before, of the leaſe which had been made to him, enters upon J. S. The queſtion was, whether the leaſe made by B. at A.'s requeſt, in part performance of the truſt, were fraudulent and void by the ſtat. 27 Eliz. c. 4. againſt J. S. as purchaſer,

(24) Vin. Abr. tit. Fraud, vol. 13. 527. Trin. 2 Jac. and vid. Moore 757.

or

or defeated by the power of revocation reſerved to B. who made the leaſe to C. and alſo the ſubſequent leaſe to J. S. And as to the queſtion of intent it was ſaid in anſwer to the fraud under the ſtatute, that the *intent* was to perform the truſt, and could not be to deceive a purchaſer, becauſe in good conſcience it was to perform the truſt for one who did not *direct* the ſecond ſale. And as to the ſecond point the power to revoke was lapſed and gone. But it has been reſolved, that a ſtranger, who makes a purchaſe, in his own name, with the money, and for the benefit of another for whom he is a truſtee, is a purchaſer within the ſtatute 27 Eliz. (25).

(25) *Poulton v. Wiſeman*, Noy 105.

In conſidering what perſons are entitled to the benefit of the ſtatute 27 Eliz. we muſt not omit to obſerve, that the ſtatute extends its protection not only to ſubſequent purchaſers of the land in fee ſimple, fee tail, and for life, lives, or years, in which clauſe mortgagees are included, but alſo to ſuch as have purchaſed any rent, profit, or commodity, in or out of the

land; which words import an obvious intention in favour of all incumbrancers. That clauſe of the act, which has in view the fruſtration of conveyances, gifts, grants, limitations of uſes, &c. made with powers of revocation, at the pleaſure of the grantor, as againſt thoſe afterwards coming in upon valuable conſideration, expreſsly extends to all ſubſequent charges upon the land; for the words are, "ſhall or do bargain, ſell, demiſe, grant, convey, or charge the ſame lands:" and charges *upon* as well as charges *out* of the land ſeem within their natural import. It is true, the conuſee of a ſtatute or recognizance has in ſtrict legal language no charge upon the land (26); he has neither a right *in* or a right *to* the land; and if he releaſe his right in or to the land, he may nevertheleſs extend it if he chuſe (*l*). But yet in common intendment ſtatutes and recognizances are charges upon the land, and they have been

(26) Vide the caſe of *Barrow* v. *Gray*, Cro. El. 551.

(*l*) Plowd. 72. 10 Rep. 50. b. Cro. El. 552. and ſee the concluſions, branching out from this diſtinction, with reſpect to tacking incumbrances, in *Brace* v. *the Ducheſs of Marlborough*, 2 P Wms. 490.

ſo

ſo called in courts of law (27). And it would have been too much to circumſcribe the operation of a law for the prevention of frauds, by inſiſting on ſuch technical formalities. Therefore on a *ſcire facias* (28), to have execution of a recognizance, where the caſe was, that E. the defendant's father, made a feoffment to the uſe of himſelf for life, remainder to the defendant the ſon in tail, with divers remainders over, with power of revocation; and then for the conſideration of 400*l.* entered into a recognizance to the plaintiff, and died; it was determined, that the land was extendable againſt the ſon. And it was ſaid, that though the ſtatute did not ſpeak expreſsly of conuſees, it ſhould be expounded to extend to them, for the ſtatute had always received an equitable conſtruction to relieve purchaſers.

(27) Vid. Hard. 173. *per* Baron Turner.

(28) *Garth v. Erſfield*, Bridgm. 22.

The *magnitude* of the thing purchaſed is not reſpected by the ſtatute: any profit or commodity in or out of the land are thereby guaranteed to the purchaſer for valuable conſideration againſt fraudulent

lent conveyances. Thus (29), upon a plea of not guilty in treſpaſs, the defendant gave in evidence articles, by which R. (under whom the plaintiff claimed as heir) ſold to him ſome trees in ſuch a wood, to be taken between ſuch a time and ſuch a time, and that he within the time took the trees; upon which the plaintiff proved that R. was only tenant in tail under a ſettlement; but as it came out, that this was only a *voluntary* ſettlement by R. himſelf, it was clearly held by Jones, C. J. that this ſale, being proved to be for a *valuable* conſideration, bound the heir as a caſe within the Act 27 Eliz.

(29) *Hatton* v. *Heale*, 1683. Bull Ni. Pr. 22 Vin. Abr. 21. tit. Voluntary conveyances D. 2.

SECTION II.

IN treating of ſimple conveyances under the ſtatutes it may be proper to obſerve, that the ſucceeding caſes and remarks will be introduced without regard to the diſtinction, which has been taken between the ſituation of creditors and purchaſers under the ſtatutes, of which they are reſpectively the object. The tenor of the adjudications on theſe ſtatutes do not appear to warrant the difference as to the merit of theſe diſtinct claimants up to the extent to which it has been carried by looſe obſervations at the bar, and particularly in *Shaw* v. *Standiſh* (1), where it was ſaid that "there is a difference between purchaſers and creditors, for the ſtatute 13 Eliz. makes not every voluntary conveyance, but only fraudulent conveyances, void againſt creditors; for that as to creditors it is not ſufficient to ſay that the conveyance is voluntary, but it muſt be ſhewn that they were creditors at the time of the conveyance made, or by ſome other circumſtance it muſt appear that the conveyance was made with intent to deceive or defraud a creditor; but in the caſe

(1) 2 Vern. 327.

caſe of a purchaſer, *all* voluntary conveyances are void without more by the expreſs proviſion of the ſtatute."

It is true, that it appears by a majority of the deciſions, ſome of which have been adverted to in a former part of this eſſay, that a family ſettlement (*a*) made *after* marriage by one not indebted at the time, is in general valid againſt ſubſequent creditors; but in *general* (2) *only*, becauſe, though the debts be upon *ſubſequent* contracts, yet if, as has before been ſhewn, the proviſions be ſuperfluous, unreaſonable, or unaccommodated to the end propoſed, or if any other ſuſpicious badges characterize the tranſaction, ſuch ſettlements, notwithſtanding the meritorious claims of children, may be challenged by ſubſequent creditors. But except in this privileged caſe of family ſettlements and proviſions, the courts both of Law and Equity ſeem to have treated conveyances *merely* voluntary

(2) Vid. ſupra p. 27. et vid. *Naylor* v. *Baldwin*, 1 Chan. Rep. 69. where the debts appear to have been contracted ſubſequently to the ſettlement.

(*a*) Vid. *Holcroft*'s caſe, Dyer 294. b. note. A man conveyed lands for the preferment of his *children*, and afterwards ſold them *bona fide*, *it is good if he was not indebted at the time*: by the Juſtices: otherwiſe it is of, &c.

as

as invalid againſt creditors upon prior *and* ſubſequent contracts. In the caſe of *Stiles* v. *the Attorney General*, which will be hereafter cited at ſome length, the claim of the bond creditor was *ſubſequent* to the grant, and yet he prevailed, although the grant was acknowledged by the court to be grounded on a juſt and equitable conſideration. If we put out of our contemplation family ſettlements and proviſions, (which as againſt creditors upon *ſubſequent* contracts, as has been before obſerved, are upon a foot with conveyances upon valuable conſiderations, unleſs accompanied with certain ſpecial indications of fraud), it may be, perhaps, doubted how far it is ſtrictly conſonant to authorities to ſay, that *mere voluntary* conveyances to ſtrangers are only *prima facie* evidence of fraud under the ſtatutes to the effect of avoiding them againſt creditors and purchaſers.

Upon an examination of the moſt indulgent caſes, wherein the want of valuable conſideration has been reſtricted in *expreſſion* to ſuch *prima facie* evidence, it yet appears to have been conſidered as ſubject to be repelled only by circumſtances which

which diſcloſe ſome ground of ſtipulation or contract. But by requiring this ground of ſtipulation or contract to reſiſt the *prima facie* evidence of a total want of valuable conſideration, theſe caſes in effect affirm, that ſome ground of ſtipulation and contract may be conſiſtent with a total want of valuable conſideration, or in other words, that a deed may be voluntary, and yet diſcloſe ſome ground of ſtipulation and contract, by which, though voluntary, it becomes valid and effectual againſt creditors and purchaſers. Whatever oppoſes *prima facie* evidence muſt be compatible with the exiſtence of the thing which raiſed the evidence, for if the circumſtances produced in reply to the alleged voluntarineſs of a conveyance repel the *charge itſelf*, inſtead of the *effect* or *evidence* of it, the enquiry reſolves itſelf into a queſtion of fact, as to the want or exiſtence of a valuable conſideration. If the alleged voluntarineſs of a conveyance muſt of neceſſity be anſwered by the allegation of a matter which ſhews the conveyance to have been not voluntary, then it follows, that the voluntarineſs of a conveyance is concluſive, and not merely *prima facie* evidence of fraudulent intent within

within the ſtatute under conſideration. Thoſe, therefore, who contend againſt the concluſiveneſs of the evidence of mere voluntary conveyances, admit too much by acknowledging, that the evidence of ſuch voluntary conveyances can only be repelled by ſhewing ſome ingredient of contract or ſtipulation, unleſs they at the ſame time maintain, that ſuch ingredient of contract or ſtipulation does not intrinſically amount to what, in the true and legal underſtanding of the expreſſion, is meant by *valuable* conſideration. Perhaps, this is a propoſition which they will not *explicitly* maintain, and if they do, the diſpute reſts merely on a diverſity in the conſtruction of words.

To ſhew therefore that a mere voluntary conveyance is not concluſive, but merely *primâ facie* evidence under the ſtatutes, that propoſition muſt be denied, which affirms that the alleged voluntarineſs of a conveyance is only to be anſwered by ſhewing ſome ground or ingredient differing it *eſſentially* from a mere gratuitous donation. It behoves the prudent reader to regard only the *ſubſtance* of the controverſy; and after paſſing the point admitted, *viz.* that in reſpect

to

to family proviſions, where there is no *internal* inconſiſtency to raiſe a ſuſpicion of fraud, the debts of the ſettler *ſubſequent* in date ſhall not prevail againſt them, to enquire whether an allegation of the total abſence of conſideration muſt of neceſſity be anſwered by proof of circumſtances which give to the tranſaction an actual tincture of contract and ſtipulation. Where the meaning of terms of technical uſe is not uniform and certain, a propoſition is better expreſſed in ſimple though circuitous language. Whatever may be the true technical import of the words *valuable* and *voluntary*, neither of which occur in the ſtatutes we are conſidering, or belong to the dialect of the common law, can it be ſaid that the caſes have eſtabliſhed it as a principle that a naked conveyance to a ſtranger without a ſingle ground of ſtipulation or contract, however good, juſt, and laudable its oſtenſible motives may be, can ſuſtain itſelf under theſe ſtatutes againſt creditors and purchaſers upon *fair pecuniary* conſiderations? It muſt be owned that the expreſſions of Lord Mansfield in *Doe* v. *Routledge* are rather large; but ſtill the caſes adduced by his Lordſhip do not, as it ſhould ſeem,

ſeem entirely to come up to the extent of thoſe expreſſions; but make it appear that his Lordſhip comprehended within the term *voluntary*, that ſort of conſideration which is expreſsly termed *valuable* in *other* caſes. His Lordſhip obſerved, that, "a father has a right to give his eſtate to *all* his children (*q*), and therefore, may fairly ſay, that unleſs you conſent to theſe limitations, I will not join." It ſeems very evident by his Lordſhip's uſe of the word '*join*,' that he had in his mind thoſe caſes, upon which the opinion of Lord Hardwicke has before been produced, wherein the parent has ſuch an intereſt

(*q*) The conteſt in *Doe* v. *Routledge* was between a *purchaſer* and the party claiming under the voluntary conveyance. The caſes cited, which exhibited circumſtances that would *clearly* have upheld the conveyances againſt the claims of creditors upon ſubſequent contracts, according to the diſtinction before adverted to, ſeemed to have been alſo ſtrongly tinctured with *valuable* conſideration; they cannot therefore be admitted to prove, in its full extent, his Lordſhip's poſition, that *voluntary* conveyances may be good againſt purchaſers.

in the land as that the ſon cannot make a proper ſettlement without his joining; as in the caſe of father, tenant for life, remainder to the ſon in tail, or in a caſe circumſtanced like the caſe of *Roe* v. *Mitton* before cited; where the whole queſtion turned upon the mother's joining in the ſettlement, which could not have been made, in the manner deſired by the parties, without the mother's concurrence.

Enough, perhaps, has been ſaid in a former part of this treatiſe, to ſhew that the *relation* of the parties in both the caſes juſt mentioned was ſuch as to qualify them to ſtipulate and contract for the controverted limitations, and that it was looked upon by Lord Hardwicke and Ch. J. Wilmot as ſupplying to the tranſaction the ſupport of a *valuable* conſideration. The other caſe of a voluntary conveyance unimpeachable by creditors or purchaſers, put by Lord Mansfield in the above-mentioned caſe of *Doe* v. *Routledge*, which ſuppoſed a relation of a married woman, having her money in his hands, to

ſay

ſay to the huſband "I will not pay this money to you, unleſs you make a proper ſettlement," falls obviouſly within the predicament of that claſs of caſes which in the eleventh ſection of the preceding chapter, have been ſhewn to have been grounded, according to the uniform opinion of the courts, on a *valuable* conſideration. His Lordſhip's inſtance of *Newſtead* v. *Searles*, was apparently the ſtrongeſt to his purpoſe; to the diſcuſſion of which caſe at the cloſe of the foregoing chapter the reader is referred.

Taking it for admitted, that all thoſe caſes which diſcloſe a ground, however ſmall, of ſtipulation and contract, are caſes of *valuable* conſideration, and that a voluntary conveyance is *at leaſt primâ facie* evidence of fraudulent intent, ſo as to throw the proof upon the perſon claiming under it; it may be in order next to examine whether any thing *ſhort* of this ground of ſtipulation and contract is ſufficient to anſwer the charge of voluntarineſs, and to ſatisfy the conſtructive exigency of the ſtatutes under conſideration.' To the queſtion why

conveyances for which natural and reaſonable motives may with ſo much conſiſtency and likelihood be alleged as to leave no ſuſpicion of fraud in the fair judgment of mankind, and to afford that high degree of probability, which, in the general concerns of life, induces a moral reliance, an anſwer has been attempted to be given in an early part of this eſſay, where the principles and rules adopted in the conſtruction of the ſtatutes of Eliz. by ancient authorities, were the ſubject of conſideration. We may add to thoſe remarks by way of general obſervation, that there is an exceſs of diſcrimination (*r*) in inveſtigating the qualities of things which in legal, as well as other objects of critical diſquiſition, tends only to draw out a queſtion to infinity. That the foundation of every rule *muſt* of neceſſity be imperfect, and that it is impoſſible to bound the ſcope of its application to a mathematical point; for rules are in the moral what claſſes are in the natural world; the

(*r*) See an obſervation to this effect by the Maſter of the Rolls in *Atkinſon* v. *Turner*, 2 Atk. 41.; and again in the next caſe by the ſame Judge, 2 Atk. 42.

helps

helps of human weakneſs, which being unable to purſue the inſenſible gradation of individual exiſtences, ſeizes upon points of viſible contraſt to make them ſerve for the denominations of its artificial diviſions. That no degree of accuracy can frame an exact ſcale of conſiderations whereby to mark the degrees from voluntary to valuable; but convenience requires that the rule ſhould begin at a notable and definitive point, though that be a point of ſome rigour, to avoid the perplexity of a doubtful barrier and amphibolous conſtructions. That partial rigour is compenſated by general certainty; and where acts are of doubtful complexion, it ſeems beſt to conſtrue them *within* the prohibition of a rule deſigned for the prevention of fraudulent pretences. That all thoſe oſtenſible motives for a conveyance, which, though they import the contrary to fraud in themſelves, may be eaſily aſſumed as a colour and protection to fraudulent tranſactions, *are* of this doubtful complexion; for there is hardly any diſpoſition of property for which reaſons of propriety, prudence, or honour, ſatisfactory enough to thoſe who

are not intereſted in diſputing its validity, may not be given; but the law is afraid of being intrapped by the ambiguity of theſe pretenſions, and calls upon the parties to come forth *tanquam in arenâ*. That in ſome caſes theſe reaſons are more imperative than in others, and that they are *moſt* of them ſatisfactory to all general purpoſes of moral inference. But that the approximating ſhades from doubt to ſuſpicion are almoſt imperceptible, and if admitted to govern the application of theſe ſtatutes, would involve the interpretation of them in thoſe ambiguities and ſubtleties, which it was their object to meet and traverſe by the breadth and certainty of their proviſions.

Perhaps the judgment of Lord Hardwicke, in the caſe of *Stiles* v. *the Attorney General* (31), was moved by conſiderations of this ſort; which caſe, as it cannot be compreſſed without the omiſſion of ſome point important to this queſtion, is here given at ſome length. The Duke of Wharton on the 24th of March 1719, by deed-poll under his hand and ſeal, conſider-

(31) 2 Atk. 152.

ing

ing that the public good is advanced by the encouragement of learning and the polite arts, and being pleaſed therein with the attempts of Dr. Young, in conſideration thereof, and of the love he bore him, did give and grant unto the ſaid Dr. Young an annuity of 100*l.* to hold during his life, out of all and every his manors, meſſuages, lands, tenements, and hereditaments, to be paid to him or his aſſigns half yearly or quarterly, with a clauſe of diſtreſs in caſe of non-payment. By an indenture dated the 10th of July 1722, made between the ſaid Philip Duke of Wharton of the one part, and Dr. Young of the other part, reciting the above deed-poll; and alſo reciting that the ſaid Duke was indebted to Dr. Young on the ſaid annuity in 250*l.* and alſo in 100*l.* more, making 350*l.*; and alſo reciting that the ſaid Dr. Young had at the ſaid Duke's ſpecial inſtance and requeſt quitted the ſervice he was in, in the Earl of Exeter's family, and thereby loſt an annuity of 100*l.*; and alſo reciting that the ſaid Duke being willing to make the ſaid Dr. Young ſome amends for his ſaid loſs in quitting the Earl of Exeter's family,

had propoſed to give him a farther annuity of 100 *l.* to be paid quarterly in lieu of the ſaid 350 *l.* and for his loſs in quitting the Earl of Exeter's family, it is witneſſed, that in conſideration, &c. the Duke did give, grant, bargain, and ſell, to Dr. Young one other annuity of 100 *l.* beſides the ſaid annuity, granted by the above-mentioned deed-poll, to hold to the ſaid Dr. Young during his life clear of incumbrances; and the ſaid Duke did thereby charge all his manors, &c. with the ſaid two annuities of 100 *l.* each. By a deed dated the 12th of July, the Duke charged the lands in truſt to Mr. Juſtice Denton, &c. with the 200 *l.* annuity to Dr. Young. Upon a bill brought by the Duke's judgment creditors in H. T. 1722, there was a decree for a ſale of the truſt eſtates, directing the money ariſing therefrom to be paid to the creditors, according to their priority, and the reſidue to the Duke.

Dr. Young, in his examination on the 4th February 1730, before the Maſter, ſet forth at large the conſiderations of the annuities; and likewiſe that the Duke of Wharton had given him a bond dated the 15th

15th of March 1721, in the penalty of 1200 *l.* conditioned for the payment of 600 *l.* in conſideration of his having taken ſeveral journies, and incurred great expences in order to be choſen a member of the Houſe of Commons at the deſire of the ſaid Duke, and in conſideration of his giving up two livings of 200 *l.* and 400 *l. per annum* value, in the gift of All Soul's College, on the promiſes made to him by the Duke of ſerving and advancing him in the world.

On the 26th of April 1740, the bond creditors of the deceaſed Duke brought their bill, ſetting forth the decree in the former cauſe; and inſiſted that all the judgment and other creditors provided for by the ſaid decree had been paid, and that there remained ſufficient in the hands of the truſtees to pay the bond debts, and that the claim of Dr. Young was to be conſidered as an annuity or *preſent* only, and ought to be poſtponed to their demands. The Maſter, on the 16th of December made a report of Dr. Young's demands, and ſtated the ſeveral facts before mentioned, relating to the ſaid

ſaid annuities and bonds; and ſaid, that he did not find any pecuniary conſideration either for the bonds or the annuities, and that ſeveral of the creditors of the late Duke, for money really lent him, were ſtill unpaid, and therefore whether the ſaid demands of Dr. Young, amounting to 365 *l.* ſhould take place of any of the ſaid debts, *ſubſequent in time* (*s*), which were for a conſideration in money, he ſubmitted to the judgment of the court.

As to the firſt annuity his Lordſhip was of opinion, that the advancement of the public good, by the encouragement of learning and the polite arts, was not a legal, but a moral conſideration, for though it might be a very *good* inducement, yet that it would not amount to a valuable conſideration in the eye of the law. But his Lordſhip thought that the refuſal by Dr. Young of

(*s*) The remark in Bull, N. P. 257. may be underſtood, perhaps, to advert only to ſettlements and advancements; for whether the debts be ſubſequent or antecedent, is a queſtion which will not affect the conſtruction in the caſe of conveyances to ſtrangers, as, poſſibly, appears from what has before been ſaid and cited on that point in a former part of this eſſay.

the annuity (*t*) of 100 *l.* which had been offered to him for his life, provided he would continue as a tutor to Lord Burleigh, upon the preſſing ſolicitations of the Duke of Wharton, and the aſſurances he gave him of providing for him, in a much more ample manner, (if that were the truth of the fact, and it was no where

(*t*) Vide *Lady Mary Herbert* v. *Earl Powis*, 6 Bro. P. C. 102. where Lady Mary's declining the place of Dame d'honeur to the Queen of France, (which ſhe had ſolicited), upon the Earl's promiſe to pay the annuity, ſeems to have been ranked among valuable conſiderations in a court of Equity, ſo as to raiſe a juſt debt there, as between the parties; and undoubtedly it would have been ſufficient at law to raiſe an aſſumpſit. But it appears, that where ſuch a conſideration only ſupports an agreement, a court of Equity, when called upon to compel a ſpecific performance of ſuch agreement, will refuſe its aſſiſtance to the prejudice of creditors, upon actual pecuniary conſiderations. This the attentive reader will collect from the caſes of *Lady Mary Herbert* v. *Earl Powis*, 6 Bro. P. C. 102. and *Jameſon* v. *Skipwith*, 1 Bro. C. R. 34. He may collect alſo from theſe and other caſes, before cited, that ſuch a conſideration as that above adverted to in the caſe of *Lady Mary Herbert* v. *Earl Powis*, though ſubſtantiated in proof, would not ſupport an actual grant or conveyance, as upon valuable conſideration within the principle or policy of the ſtatutes of Elizabeth.

contra-

contradicted), did certainly amount to a valuable conſideration; for the valuable conſideration would equally ariſe where a perſon gave up a *certain* pecuniary advantage at the time of the grant, as where a ſum of money was actually paid down at the time. And, continued his Lordſhip, though the firſt annuity might be voluntary, taken ſingly, yet that the recital in the ſecond would alter the nature of it, and turn it into a valuable conſideration, for as there were arrears on the firſt, it was without doubt a juſt and lawful debt, and the promiſing not to ſue for thoſe arrears, was a good conſideration, and from that time the firſt annuity ceaſed to be a voluntary grant. But his Lordſhip was clear as to the bond, which was recited to be given in conſideration of Dr. Young's having been at a very great expence, when he was a candidate for a ſeat in parliament, that it was not ſupported by any valuable conſideration, for Dr. Young could not be ſuppoſed to be a candidate for a ſeat in the Houſe of Commons, with any other view but that of ſerving his country.

In

In the caſe of *Jameſon* v. *Skipwith* (31), where a bill filed by a tutor againſt his pupil's executors, for an annuity for his own life was diſmiſſed, we are to look for the reaſon of the decree in the uncertainty of the claim, which reſted on the general words of the teſtator's will, whereby he charged his eſtate with all his debts, by bond, mortgage, or ſimple contract, and on letters written by the teſtator before making the ſaid will, referring to an annuity, but without any ſpecific length of time named. As the claim was ſet up only againſt the repreſentatives of the party, a ſtrictly *valuable* conſideration was not neceſſary to its ſupport, but it wanted the ſubſtance of a real engagement, and the form of an actual ſtipulation to induce the interpoſition of a court of equity. We find however in this caſe, in the reaſonings of the counſel and the court, a deciſive recognition of the Chancellor's diſtinctions, in the above caſe of *Stiles* v. *the Attorney General*, and an implicit admiſſion that an annuity granted upon the good and juſt conſideration of inſtruction and tutelary care, is only availing as between

(31) 1 Bro. C. R. 34.

the

the parties and their repreſentatives, but not againſt thoſe, whoſe valuable conſiderations as creditors or purchaſers, entitle them to the protection of the ſtatute of Elizabeth againſt fraudulent conveyances.

(32) Ambl. 387.

Peat v. *Powell* (32) was a caſe upon the bankrupt laws, under which a conveyance without valuable conſideration was *clearly void* by the *letter* of the ſtatute: it may ſerve, however, to ſhew the ſenſe of the courts as to the circumſtances conſtitutive of a valuable conſideration when creditors are oppoſed. A teſtator, by his will, taking notice that he had laid out great ſums in the education of his eldeſt ſon John, in conſideration thereof directed his ſaid ſon John to relinquiſh all his right in the leaſehold eſtate to his the teſtator's younger ſon Giles, to whom he gave the ſaid leaſehold eſtate; and then he deviſed all the reſt reſidue and remainder of his real and perſonal eſtates, in truſt for his ſaid younger ſon, till he attained twenty-one, and then the truſt was to ceaſe. Giles attained twenty-one in the teſtator's life-time; after the teſtator's death John claimed

claimed the freehold eſtate as heir at law of the teſtator, inſiſting that the will was void, and threatening to commence a ſuit at law unleſs Giles would convey the eſtate to him: to avoid which, at the recommendation of his mother, Giles, by indenture dated 30th Auguſt 1747, releaſed and conveyed his right to the freehold eſtate to his brother John, who covenanted to pay half an annuity charged upon the eſtate to their mother. At the time of executing the releaſe Giles was indebted to G. T. in 500 *l.* upon bond, and on the 23d of December 1756 became bankrupt. The aſſignees brought their bill, to have the eſtate conveyed, and to have the deeds delivered up to them. And the Lord Chancellor ſaid, that it was not like the caſe where conveyances are made to quiet family differences (*u*), in which caſe the court would

(*u*). It appears that the ſettlement of diſputed boundaries, and in general the object of removing contention, and compromiſing adverſe claims, conſtitute a *good* conſideration to ſupport ſuits in equity for the ſpecific performance of agreements. Vide 1 Vez. 450. But it ſeems clear that ſuch conſiderations will not be good againſt perſons coming in upon *valuable* conſideration.

not

not require ſtrict equality of conſideration; but that there no reaſonable equivalent was given by John.

(33) Ambl. 596.

Partridge v. *Gopp* (33), determined by Lord Northington, was a ſtrong caſe to the ſame effect. There, a teſtator by his will gave 6000 *l.* to truſtees upon truſt to pay the intereſt to S. C. for her life, for her ſeparate uſe, and afterwards to pay the ſame among her children. S. C. brought her bill againſt the teſtator's widow and J. S. the executors, praying to have the 6000 *l.* ſecured. An account was directed to be taken of the perſonal eſtate in 1736. In 1745 J. S. the executor was, by an order of the court, committed to the Fleet priſon, for non-payment into the Bank of the ſum of 3000 *l.* part of the eſtate of the teſtator in his hands, where he remained till his death in 1750; and the cauſe was revived againſt Gopp and Edwards the defendants, whom J. S. had made his executors. On the 4th April 1753 the Maſter reported a conſiderable balance due from the eſtate of J. S. to that of the teſtator; and it having been diſcovered that J. S. had advanced

vanced to his children divers ſums of money, and the eſtate of the teſtator proving inſufficient to pay the legacies, and J. S. having died inſolvent, a ſupplemental bill was filed againſt Gopp, who had married one of the daughters of J. S. ſince deceaſed; Elizabeth Edwards widow, another of the daughters, who had married Henry Edwards deceaſed; and againſt Sarah and Catharine, daughters alſo of J. S. for a diſcovery of the money ſo advanced, and to have the ſame refunded. Gopp, by his anſwer, admitted, that J. S. had given him, in 1744, on the day of marriage, 500*l.* as a portion with his wife, which he ſaid was in purſuance of an agreement before marriage. The other married daughter of J. S. made the ſame defence. Sarah and Catharine confeſſed that in 1743, J. S. had made them each a free gift of 500*l.* for their maintenance and ſubſiſtence in the world. And they all denied knowledge of the bad circumſtances of J. S. at the time he advanced the money. It was inſiſted for the plaintiffs that theſe were fraudulent gifts within the ſtatute 13 Eliz. c. 5.—For the defendants

it was argued, that they were not fraudulent, becauſe there was no ſecret truſt, and they might be conſidered as payments of debts of nature. As to the married parties, the Chancellor ſaid, there was a good conſideration, and diſmiſſed the bill as to them. With reſpect to the other children, his Lordſhip obſerved, that it had ſtruck him at firſt as a hardſhip to make the children refund; eſpecially as ſuch a gift could not be conſidered as a *truſt* for the giver. *But on conſideration he thought that no man has ſuch a power over his own property, as that he can diſpoſe of it ſo as to defeat his creditors, unleſs for conſideration.* That it is the motive of the giver, not the knowledge of the acceptor that is to weigh. That the ſtatute extends to all caſes, except where there is good conſideration and *bona fides:* and that blood has been held not to be a good conſideration. That he had no doubt but that the voluntary gift proceeded from affection getting the better of juſtice. And laſtly, that it was done ſecretly and *pendente lite.*

The reporter in a note to the above caſe adds, that Mr. Wilbraham thought that his

his Lordſhip laid down the poſition too largely, and therefore aſked him in court for the information of the bar, whether he did not mean to confine it to the circumſtances of *that caſe?* for that otherwiſe a parent could not make any proviſion, of ever ſo ſmall a value, to his child without its being liable to be taken away in favour of creditors. To which his Lordſhip ſaid, that the fraudulent intent is to be collected from the magnitude and value of the gift.

This caſe gives occaſion for a few obſervations. According to the report of it, Lord Northington thought himſelf called upon by the ſtatute 13th Eliz. to decree a gift or conveyance fraudulent againſt creditors, merely from the circumſtance of it's being *voluntary*, nor was any iſſue directed to take the ſenſe of a jury on the queſtion of *fraudulent* intent. In the caſe above cited, of *Stiles* v. the *Attorney General*, there were no extraneous marks of fraud: on the contrary, it was expreſsly declared by the court to exhibit a juſt and moral conſideration; and though in the

caſe, juſt produced, of *Partridge* v. *Gopp*, the voluntary conveyance was made *pendente lite*, yet the Chancellor choſe to reſt his deciſion on the broad propoſition that "*no man has ſuch a power over his own property as to be able to diſpoſe of it, ſo as to defeat his creditors, unleſs for conſideration*", rather than upon any ſymptomatic circumſtances of fraud in the tranſaction.

The *ſubject* of the relief in the laſt cited caſe of *Partridge* v. *Gopp* points it out for particular obſervation. A diſtinction was taken by the counſel for the defendants between gifts of perſonal eſtate, and conveyances of real eſtate. As to the former of which, it was contended, that the ſtatute would never conſtrue them to be made with intent to defraud creditors, *unleſs there was a ſecret truſt for the donor*. Real eſtate, it was ſaid, remains and cannot be conſumed like mere perſonal chattel: money might be ſpent and gone: and, therefore, they apprehended, that the gift's being *voluntary* is ſufficient evidence of fraud as

to land, but not as to money. The Chancellor was ſomewhat ſtruck with the diſtinction at firſt, and ſeemed to doubt how far money could be brought back by force of the ſtatute, after actual poſſeſſion had been given; but he was ultimately of opinion, that the diſtinction taken at the bar was ill founded, and that the quality of the thing given, ought not to cripple the beneficial operation of the ſtatute, with reſpect to fraudulent gifts.

It muſt be owned, however, though the diſtinction made at the bar, in the above caſe, between real and perſonal eſtate, can never be admitted to the extent of including among thoſe kinds of property which are beyond the reach of the ſtatute all deſcriptions of perſonal eſtate, yet that there is an extreme difficulty in applying the proviſions of the ſtatute to property exiſting in the ſhape of money. It is true that, although money, in the language of the courts, is ſaid to have no *ear-mark*, the court of chancery has, in ſome caſes, where an executor has laid out his teſtator's money in land, purſued the

property in favour of a legatee, notwithſtanding the change in the ſubſtance of the thing (34); but this it can only do through the medium of a conſtructive truſt, which renders the juſtice of that court, ſometimes independent of the legal qualities and changes of property. And where an executor had inveſted his teſtator's money in the purchaſe of ſtock (35); this was determined to be no appropriation or converſion of the teſtator's eſtate, ſo as to prevent a court of Equity from following it, as much as if it had remained in the condition it was in at the teſtator's death. But if an executor gives away the aſſets of his teſtator, among his own family, a court of Equity, independently of this ſtatute, cannot follow the money in the hands of the voluntary donees, ſo as to compel them to refund; but the remedy is againſt the executor, either for an account in equity, or for a devaſtavit at law. The ſtatute 13th Eliz. does not enlarge the natural juriſdiction of any court, by furniſhing any new remedies. It merely avoids the voluntary act, leaving the reſt to the conſequences and remedies of law.

(34) See the caſes of *Lane* v. *Dighton*, Ambl. 409. *Ryal* v. *Ryal*, Ambl. 413. *Bulgney* v. *Hamilton*, Ambl 414.

(35) *Waite* v. *Whorwood*, 2 Atk. 159.

Where

Where lands or chattels are voluntarily and fraudulently transferred, the ſtatute 13th Eliz. avoids the transfer as againſt creditors, who have a right to regard the property as unaltered, and conſequently ſtill ſubject to their executions; but the ſtatute helps them no further than by allowing them to avail themſelves of this conſtruction by the judicial remedies which flow from their rights. So that if the court of Chancery could not, in a caſe circumſtanced like that above cited from Ambler, where no fraud was imputable to the *donees*, compel them to refund, independently of the ſtatute 13 Eliz., it is difficult to ſay what virtue was derived to the decree in that caſe from the authority of the ſtatute.

To the remedy at law, under this ſtatute, there is a *natural boundary* affixed, where the voluntary gift is of money, or other flux or conſumable chattel; for the creditor muſt wait till he has proſecuted his ſuit to execution before he is ripe for litigation upon the ſtatute in queſtion, and if the individual property is, in the mean time, gone or con-

ſumed, he cannot challenge by force of the ſtatute, unleſs by freſh action upon its penal clauſe, a right to damages or recompence in value. And it does not ſeem that equity will ſpecifically follow, what is not the ſubject of a legal execution. So that money, which is of no intrinſic eſtimation, but merely the meaſure or medium of value, does not appear to be naturally embraced within the proviſions of the ſtatute 13 Eliz.; with reſpect to which ſtatute it is not eaſy to admit that the bounds of its operation can be extended in courts of equity. We find it ſtated therefore, in Viner, tit. *Fraud*, F. pl. 27. that, where a man, being much indebted, gave 600 *l.* for the benefit of his younger children ſix hours before his death, ſuch gift was not fraudulent as againſt creditors, though it would have been ſo, if *real eſtate* or *chattel real* had been conveyed: a poſition, perhaps, a little too ſhort, ſince there certainly are many articles of property not coming within the deſcription of *chattel real* of which ſuch gift or aſſignment would be fraudulent as againſt creditors. It ſeems, alſo, to have been the opinion in the

the caſe of *Fletcher et al.* v. *Sidley et al* (36), that ſuch gift of *money* would not fall within the proviſions of the ſtatute 13th Eliz.

(36) Eq. Ca. Abr. 149. 2 Vern. 490.

But to return to the queſtion as to what *degree of inducement* will form a conſideration ſufficient to ſupport a conveyance to a ſtranger, as againſt creditors and purchaſers within the ſtatutes.

In the argument of *Twine's* caſe, Anderſon, Chief Juſtice of the Common Pleas, put a caſe to this effect (37). A man of weak underſtanding and incapable of managing an eſtate, which had deſcended to him, and being given to riot and diſorder, by the mediation of friends *openly* conveyed his lands to them upon truſt to take the profits, and apply them to his maintenance, in order to prevent his waſting and conſuming the ſame; and afterwards being ſeduced by deſigning and deceitful perſons, bargained and ſold to them his lands, which were of *great* value for a *ſmall* ſum of money. This bargain, although it was for *money*, was holden to be out of the ſtatute,

(37) 1 Rep. 836.

ſtatute, for that Act does not help any purchaſer who does not come to the land for a good conſideration, lawfully and without fraud or deceit; but ſuch conveyance, obſerved the Chief Juſtice, made on truſt, *is void as to him who purchaſes the land for a valuable conſideration, bona fide, without deceit or cunning.* The ground upon which that caſe was decided evidently involved an admiſſion, that if the purchaſer had come in upon valuable conſideration, and *bona fide*, his claim would have prevailed againſt the antecedent conveyance, and this negative inference ariſing from the caſe was confirmed by the poſitive ſtatement of the Lord Chief Juſtice himſelf, who related it, and who ſeemed to ſpeak the ſenſe of the other Judges of his time. It appears, therefore, that the preſumption of fraud raiſed by the ſtatute from the want of valuable conſideration, was eſteemed to be ſo ſtrong as to diſpenſe with proof of actual and viſible fraud in the voluntary conveyer. For ſurely the ſpecial circumſtances of the foregoing caſe, ſo far from being indicative of fraudulent intent, were ſtrong on the ſide of a contrary

trary inference. But the preventive policy of the ſtatute was thought to demand this ſacrifice to the ſalutary *certainty* of rules and the perfection of its *general* object.

It may be obſerved, that had the purchaſer been without the imputation of fraud, he would have taken the legal eſtate, and not the truſt intereſt, out of the *ceſtuique* truſt, for the whole previous tranſaction would have been radically overthrown by the ſubſequent conveyance, and *this* upon the ſtrength of the imputed fraudulency of intent within the ſtatute. For the ſtatute will not liſten to a particular ſtory of intellectual incapacity, againſt the ſtrong preſumption furniſhed from the two inconſiſtent conveyances. It is impoſſible to ſay what degree of capacity is competent to the conception of fraud, and it ſeems that the ſtatute would be thrown into great difficulty of execution, if its efficacy could be ſtopped by ſo ambiguous a plea. Nevertheleſs the circumſtances of ſuch a caſe muſt always caſt a ſuſpicion on the character of the purchaſer, ſo as to exclude him upon very ſlight additional grounds,

grounds, from the protection of this law.

In the caſe of ſeduction, where the ſeducer, by way of making ſuch reparation for the injury done by him as was in his power, has entered into a bond for the payment of a ſum of money; though, in ſo doing, he has been conſidered as fulfilling the dictates of his conſcience, and ſuch conſideration has been particularly reſpected both in courts of equity and law, yet it has been diſtinctly held, that this is not a *valuable* conſideration, and therefore not good againſt creditors (*x*). And we may deduce as a conſequence from this poſition, that a *conveyance* reſting upon ſuch a conſideration would be void within the ſtatute 27 Eliz. againſt ſubſequent purchaſers for pecuniary conſideration.

(*x*) Vide the caſe of *Turner* v. *Vaughan*, 2 Wilſ. 339. and what is ſaid in the ſame caſe by Clive J. in reſpect to a determination of Sir Joſeph Jekyll. See alſo *Lady Coxe*'s caſe, 3 P. Wms. 339. Mr. Serjeant Williams has referred to all the caſes on this ſubject of the premium *pudicitiæ* in his note to the caſe of *Cray* v. *Rooke*, Caſ. Temp. Talb. 153.

With

With reſpect to conveyances or aſſignments for *payment of debts* ſome diſtinctions ſeem proper to be taken.

And firſt, it may be remarked, that a general conveyance or aſſignment to a ſtranger, in truſt to pay the debts of the perſon conveying, is, clearly, not a conſideration ſufficient even to raiſe an uſe upon a covenant to ſtand ſeized. Nor will it ſuffice to ſupport an actionable promiſe; for in ſuch caſe no conſideration moves from the promiſee of advantage to the *party promiſing*, or of detriment or charge to *himſelf*.

That the mere deſtination of the property to the object of paying the debts of the grantor is not ſufficient to raiſe the uſe upon a covenant to ſtand ſeized, or bargain and ſale, appears from *Lord Paget*'s caſe (38). L. P., being ſeized in fee of the manor of B. by indenture between himſelf of the one part, and T. on the other part, in conſideration that the ſaid T. with the profits of the ſaid manor, would pay his debts, and ſuch ſums of money

(38) 1 Leon. 194.

money as were contained in ſuch a ſchedule; covenanted to ſtand ſeized of the ſaid manor to the uſe of the ſaid T. for the term of twenty-four years, and after the expiration of the ſaid term, to the uſe of W. P. his ſon, in tail, with divers remainders over. And it was there holden and agreed by all the Juſtices and the counſel on both ſides, that the uſes limited to T. and others were void for want of a conſideration ſufficient to raiſe an uſe; for the money, which was appointed for the payment of the debts, was to come out of the profits of the land of the ſaid L. P. ſo that no conſideration at all moved from T. But in the ſame caſe it was clearly agreed, that, if T. was to have paid the debts out of the profits of his *own* lands, there would have been conſideration ſufficient; by which muſt have been meant, that, in ſuch a caſe, there would have been a good conſideration to ſupport the conveyance as a bargain and ſale; and, no doubt, had the caſe been ſo, the deed would have required inrolment.

That

That ſuch a conveyance for payment of debts, to which no creditor is a party, cannot ſupport itſelf, under theſe ſtatutes of Elizabeth, againſt purchaſers, or diſcontented creditors, is a propoſition flowing pretty clearly from the general analogy of the reported deciſions, and deducible from the very plan and ſpirit of the ſtatutes themſelves. The Lord Keeper Finch, *anno* 27 Car. 2. in the caſe of *Leech* v. *Leech* (39) declared, that a truſt for payment of debts generally is good againſt an *heir*, though no creditor be party to the deed, nor debt expreſſed in particular, nor covenant in the leaſe to pay; but, at the ſame time, his Lordſhip obſerved, that he would not maintain it againſt a *purchaſer*.

(39) Chan. Ca. 249. et vid. 2 Vern. 510. *Turback* v. *Marbury*.

But if a *creditor* be a *party* to ſuch a conveyance to a truſtee for payment of debts, however open the tranſaction may *ſtill* be conſidered to the imputation of fraud from concomitant circumſtances, there is a clear valuable conſideration to ſupport the deed, ſince forbearance of ſuit

and mutual accommodation are expreſſed by the terms, or implied in the very nature of the tranſaction. In ſuch a caſe there is a plain inducement to the party conveying, not founded upon a vain apprehenſion of *poſſible* danger, or an alarm excited by groundleſs menaces, which, as we have ſeen in the before cited caſe of *Peat* v. *Powell* (40), will not form a valuable conſideration for the conveyance, but a rational anxiety to avoid the expence and diſgrace of a ſuit, which the party knows himſelf incompetent to defend. It is not the moral inducement that takes ſuch a caſe out of the ſtatutes of Eliz. (for to admit ſuch a ground of ſupport would be to furniſh fraud with a convenient colouring, upon the danger of which enough has been ſaid), but the leſs equivocal motive of temporal advantage.

(40) Amb. 387.

What then would be the effect, under theſe ſtatutes of Eliz., of a conveyance to creditors, or to which creditors are parties, for the payment of debts, the remedy for which has been barred by the ſtatute of

of limitations? for here it ſeems that the debtor can be influenced only by moral motives, ſince the plea of the ſtatute is peremptory in the courts both of law and equity; and though moral obligation may be good to raiſe an *aſſumpſit*, it has not that ingredient of value which is conſtitutive of the effectual conſideration within theſe ſtatutes of Eliz. It may be obſerved, however, that in ſuch a caſe the ſlighteſt acknowledgment revives the debt at law by removing the bar of the ſtatute of limitations; ſo that, without doubt, the tranſaction, above ſuppoſed, involves an inſtantaneous reſtitution of legal remedies. And though, it is true, the tranſaction, in its firſt movement, was voluntary, yet it will be hard to maintain that real and *bona fide* creditors re-inſtated in their rights of action, without a ſuſpicion attaching upon their conduct, ſhall be compelled to relinquiſh a ſecurity which had its birth in a conſcientious though ſpontaneous act. Beſides which, ſomething of ſupport may be derived to the tranſaction from its analogy to thoſe

caſes of *ex poſt facto* conſideration, which will be a future ſubject of diſcuſſion.

But it ſhould ſeem to be out of diſpute, that, where, as in the caſe of Lord *Paget*, above cited, a man conveys an eſtate to a ſtranger for the payment of debts out of the rents and profits, (which may be regarded as a clear voluntary conveyance) no creditor being party or privy (how far the bare privity and conſent of a creditor or creditors proveable *debors* the inſtrument might avail is doubtful), or, as in the caſe laſt ſuppoſed, conveys to a creditor, for the payment of debts barred by the ſtatute of limitations, if the perſons intereſted under ſuch deed bring their bill in equity for a decree to compel the performance of the truſts (which, as no *ceſtui que* truſt is a volunteer as to his truſtee, may always be obtained) the decree ſupplies a perfect conſideration, and validates the whole *ab origine*; for it would be a ſtrange thing if the fraudulent intent within theſe ſtatutes could be charged upon the proceedings of a court of juſtice. And perhaps the *lis pendens*

dens alone would defeat the title of a ſubſequent purchaſer; for though the creditors may not have fixed the intereſt by original ſtipulation or bargain, yet if the ſimple conveyance to a truſtee, without their knowledge, for their benefit, have conſequentially induced their forbearance of compulſory proceedings, there accedes to the tranſaction a ſort of ſubſecutive conſideration, which, if it do not change the nature of the conveyance, ſo far affects the character of claimants as to throw upon the perſon purchaſing with *notice* the imputation of corrupt dealing. Thus it appears in the caſe of *Langton* v. *Tracey* (41), that a conveyance in truſt to pay debts, though no creditor was party, nor any certainty as to perſons appeared in the deed, nor in any ſchedule annexed, was decreed good againſt a ſubſequent purchaſer with *notice* of the truſt. And, upon the whole, theſe are caſes of ſuch danger to purchaſers, that a prudent adviſer can hardly recommend a title, which has been at all the ſubject of arrangements for the payment of debts remaining unſatisfied.

(41) 1 Ch. Rep. 33.

With reſpect to ſuch conveyances or aſſignments as are taken by a creditor or creditors from the debtor by way of ſecurity or ſatisfaction, there can be no doubt but that they are *prima facie* good within theſe ſtatutes, of Elizabeth; for they clearly ſtand upon a valuable conſideration. This was diſtinctly admitted in *Twyne*'s caſe; where the debtor having made a deed of gift of all his goods and chattels of the value of 300 *l.* to a creditor, whoſe debt was 400 *l.* to avoid the effect of an action commenced againſt him by another creditor, the court reſolved that there being a real debt owing to the aſſignee, the avowed conſideration for the aſſignment was perfectly good and unimpeachable; but the tranſaction, being in other reſpects fraudulent, fell within the proviſions of the ſtatute 13 Eliz. So, in a late caſe (42) where L. A. being indebted to ſeveral perſons, by a deed to which a creditor was a party, conveyed part of his real and perſonal property to a truſtee, upon truſt, to pay half of the rents and profits to the grantor, and the reſidue among certain creditors named in a ſchedule; the deed

(42) 5 T. R. 420. *Eſtwick* v. *Caillaud.*

deed being accompanied by none of thoſe indications of fraud by which *Twyne's* caſe was diſtinguiſhed, was held by the court of King's Bench to be good and valid as againſt a creditor not named in the ſchedule.

SECTION III.

A man ought not to be bountiful at the expence of juſtice. It ſhould ſeem clear, therefore, that nothing in the ſtatute 43 Eliz. c. 4. can be conſtrued to give any ſtability to donations to charitable uſes, as againſt *bona fide* creditors, where the donor is indebted at the *time* of his making the gift. But as a diſpoſition of property to a charitable uſe within the 43 Eliz. though purely voluntary, is *irrecoverable*, ſo that ſecret reſervations and truſts are not to be preſumed, conſidering too the general favour of the law to ſuch public benefactions when clear of all ſuperſtitious taint, it might be too much to ſay, that debts ariſing upon *ſubſequent* contracts can prevail againſt a perfected gift or conveyance to charitable purpoſes, made conformably to the reſtrictions of the 9th of the late King. But the court of Chancery, in the diſtribution of aſſets, where charitable bequeſts, and the claims

of creditors, come fairly into competition, give a decided preference to the latter, and ſhew to the former ſo little reſpect, as, in caſe of a deficiency of aſſets, to make them abate in proportion with other legacies (1), notwithſtanding the favour they find in the civil law above other bequeſts (2). The caſe of *purchaſers* has been ſpecially provided for by the ſtatute of charitable uſes. By virtue of that ſtatute, and according to a train of judicial conſtructions, which, in times nearer the date of the ſtatute, were abundantly favourable to this deſtination of property, a purchaſer is ſubjected to ſome diſqualifications which do not affect him under the ſtatutes of fraudulent conveyances. Thus a purchaſer for valuable conſideration will not prevail againſt a former voluntary conveyance, if he comes in with notice of the charitable uſe. Though it was reſolved in *Eaſt Grinſtead*'s caſe (3), that the notice muſt be certain, and perſonal to the purchaſer. As, where land given to charitable uſes was intended to be ſold by act of parliament, and a bill was brought for that purpoſe, whereupon it was ſaid

(1) 1 P. Wms. 265. 421. 675.

(2) *Fielding* v. *Bond*, 2 Vern. 230.

(3) Duke 64.

in the Houſe upon the reading of ſuch bill, that the land was charged with a charitable uſe, in conſequence whereof the bill did not paſs, and the ſame land was afterwards ſold to a member of the Houſe, who was preſent at the reading of the bill on the former occaſion, and delivered a ſpeech upon the ſubject; this general notice was deemed inſufficient to vitiate the title of the purchaſer.

It was reſolved alſo in the ſame caſe, in favour of theſe humane grants, that lands charged with a charitable rent continue charged even in the hands of a purchaſer without notice (4). But the purchaſer under the ſtatute 43 Eliz. c. 4. beſides the diſqualification ariſing from notice, has been ſubjected, from the ſame tenderneſs of the courts for charitable uſes, to very ſtrict conſtructions, as to the valuable conſideration neceſſary to ſupport his claim. The word *valuable* is rigidly bound down to things of a pecuniary meaſure and appreciation, ſo that even marriage has been ſaid to be no valuable conſideration within this ſtatute of charitable uſes (5). So alſo, if the conſideration of the ſale be things of ſhew

(4) Duke 159.

(5) Duke 177.

or arbitrary worth, as jewels, &c. or if the conſideration be executory (6), or if the conſideration be mixed, as money and natural affection (7), or if an inadequate price be given (8), theſe charitable uſes, it is ſaid, will prevail againſt a conveyance to a purchaſer. But within the deſcription of valuable conſiderations under this ſtatute are included plate of a known weight, releaſe of debts, of arrears of rent, or of a covenant broken; but a mere poſſibility in land has been holden to be no conſideration within this ſtatute of charitable uſes.

(6) Duke 177.

(7) Ibid.

(8) Ibid.

SECTION IV.

A *Donatio cauſâ mortis* muſt upon every principle of good policy and analogous reaſoning be void as againſt the donor's creditors. Until the donor's death the gift, being incomplete and ſuſpended, ſeems *clearly* to be within their reach. And the conſideration of mortality can avail nothing; for nothing ought ſo to preſs upon the recollection of a dying man as the obligation of diſcharging his debts, and nothing can be ſanctified by death which was corrupt *inter vivos*. Pere Williams has ſubjoined to his report of the caſe of *Drury* v. *Smith* (1), a memorandum of a caſe between *Smith* v. *Caſen* determined 8th December 1718, where, jewels having been given by way of *donatio cauſâ mortis*, it was doubted by the Maſter of the Rolls whether this was good againſt the debts of the deceaſed; and the reporter adds, that it ſeems *not*; for being given in caſe of the

(1) 1 P. Wms. 405.

the donor's death and in the nature of a legacy, it is fraudulent againſt creditors. And with this agrees the imperial law. *Sicuti legata non debentur niſi deducto ære alieno aliquid ſuperſit, nec mortis cauſâ donationes debebuntur; ſed infirmantur per æs alienum* (2). And if we ſuppoſe debts to be contracted between a man's laſt ſickneſs and death, it appears to be the ſenſe of the civil law, that ſuch ſubſequent debts ſhall invalidate the gift; though this ſeems to be only following up the analogy between theſe *donationes cauſâ mortis* and legacies. *Si æs alienum interveniat, ex re mortis cauſâ ſibi donatâ nihil aliquis conſequetur* (3). But whether the transfer partakes moſt of the quality of a *gift* or *legacy*, being ſtill only voluntary, it ſhould ſeem to be equally void as againſt creditors, after the donor's death. And though perhaps it may not fall, as a *legacy*, within the province of an executor to adminiſter, yet, if it be void as a *gift*, it muſt come to the executor as aſſets for the ſatisfaction of creditors. And if an action were commenced againſt an executor, without a ſufficiency of other aſſets, for a debt of the teſtator

(2) D. L. 35. tit 2. l. 66. § 1.

(3) Ibid.

teſtator, perhaps by ſuch ſuit, the property in the ſubject of a *donatio cauſâ mortis* might be conſidered as fixed in the executor in quality of aſſets for the ſatisfaction of the judgment, and ſo as to entitle him to an action of trover for the gift againſt the donee (*a*).

(4) 1 Vern. 365.

In the caſe of *Allen* v. *Arme* (4), E. A., having ſurvived his wife, who had died without iſſue, and having been formerly ſervant to his wife's mother, who had given a portion of 600 *l.* with her daughter, part of which had been laid out in the purchaſe of the copyhold lands in queſtion, being dangerouſly ill, out of reſpect to the memory of his wife, and kindneſs for her nephew, voluntarily ſurrendered the lands to the uſe of himſelf for life, with remainder to H. A. the nephew in fee; but afterwards recovering and marrying again, ſettled the ſame lands upon his ſecond marriage. Here, though it was inſiſted on the part of thoſe claiming under the ſettlement on

(*a*) Vid. Strange 777. and conſult the caſe of *Tate* v. *Hilbert*, 2 Vez. Jun. 111.

the

the ſecond marriage, that the ſurrender having been made by A. in the time of his ſickneſs muſt be intended by him not to bind if he recovered of that ſickneſs, it being merely voluntary, and that his intentions appeared to be ſo by his having, after his recovery, ſettled the ſame lands before his marriage on the plaintiff his ſecond wife and his iſſue by her, who were to be taken as purchaſers, and as ſuch were entitled to relief againſt a precedent voluntary ſurrender; yet the Lord Chancellor declared, he would not infer any intention contrary to the ſurrender, and diſmiſſed the bill, as there did not appear to be any fraud or truſt in the caſe. The reporter has left us to gueſs at many circumſtances of the caſe; but there appear in it ſeveral ingredients which materially differ it from the caſe of *Douglas* v. *Ward* (5), cited in a former part of this eſſay. The real apprehenſion of the approach of death is certainly not very conſiſtent with the ſuppoſition of any views of fraud towards a ſubſequent purchaſer, and leaſt of all a purchaſer by marriage, for marriage and mortality do not appear together

(5) 1 Chan. Ca. 99. Vid. ſupra 367.

together in the ſame proſpect. But what degree of ſickneſs ſhall induce ſuch ſerious apprehenſions in the patient as to baniſh all temporal proſpects, is a point lying beyond the reach of legal evidence; and therefore the circumſtances of a man lying in a dangerous ſickneſs furniſh no certain teſtimony of innocence under theſe ſtatutes. But it appears from the report, that the nephew had alſo married ſince the ſurrender in his favour, and probably before the ſecond marriage of the ſurrenderor, and the nephew's widow, who was defendant in the cauſe, which was revived, after the deaths of the uncle and nephew, between their repreſentatives, claimed by a ſurrender upon *her marriage alſo.* So that there appears to have been a conſideration *ex poſt facto* to ſupport the title of the defendant. Probably the ſecond ſettlement made by the firſt ſurrenderor, reſted only in covenant, which was the reaſon of the application to a court of equity; and, in this view of it, we perceive only three particulars which differ it in circumſtances from the caſe of *Douglaſs* v. *Ward*, where a voluntary ſettlement by a huſband upon his firſt wife was

was ſet aſide in favour of a jointreſs under a ſecond marriage: 1. the ſickneſs of the voluntary ſettler, which repels the ſuſpicion of any proſpect of a ſecond marriage; but which, as has been obſerved, is equivocal teſtimony: 2. the ſubject of the ſettlement's being copyhold, as to which, perhaps, ſome queſtion has been made whether or not, it comes within the ſtatute 27 Eliz. c. 4. (6), although the point at this day ſeems not to remain in much doubt (*b*): and 3. the marriage of the volunteer and his ſettlement of the eſtate upon his marriage, which brings the caſe within the principle of ſome of thoſe *ex poſt facto* conſiderations, which will be treated of in a ſubſequent part of this volume.

(6) Vid. *Doe v. Routledge*, Cowp. 705. et ſeq.

(*b*) How far ſurrenders of copyhold lands are within the ſtatute 13 Eliz. *with reſpect to creditors*, may, perhaps, be doubted, ſince it may be ſaid, that they have not the effect of delaying, hindering, or defrauding creditors, who cannot iſſue proceſs to levy a debt upon a copyhold eſtate. It has been determined not to be an act of bankruptcy on a ſimilar ground. *Ex parte* Cockſhot, 23 March, 1792.

SECTION V.

IN reviewing the caſes decided upon the ſtatute 13 Eliz. we may obſerve the diſtinction in favour of advancements to children, by perſons not indebted at the time, to be pretty clearly and uniformly maintained in the opinions of the greateſt lawyers: and by adverting to this diſtinction, we are able to reconcile many judgments, which might otherwiſe appear diſcordant. Thus, where Lord Coke ſitting as Chief Juſtice in the caſe of *Tyrer* v. *Littleton* (1), declares his opinion, that natural love to a child muſt be regarded as a good conſideration within the proviſo of the ſtatute 13 Eliz. and in *Twyne*'s caſe affirms, that nothing but a valuable conſideration is a good conſideration within the ſtatute, and carefully diſtinguiſhes between a ſtrictly valuable conſideration, and the conſideration of love and affection, we are to underſtand him diſtinctively with reference to

(1) 2 Brownl. 289.

to the ſubject matter. According as he ſpeaks of natural love as an availing or void conſideration within the ſtatute, his meaning muſt be referred to caſes wherein the debts aroſe upon prior or ſubſequent contracts: as where, in *Tyrer* v. *Littleton*, he ſays, that affection of blood is good within the proviſo, *except it were to defraud creditors*, and in *Twyne*'s caſe, affirms that ſuch conveyance in conſideration of natural affection *by a perſon indebted*, is fraudulent within the ſtatute of Elizabeth. It is worthy of remark, that the whole ſtrain of Lord Coke's reaſoning in the laſt mentioned caſe ſhews it to be his opinion that the ſtatute 13 Eliz. ſhould be ſo conſtrued as to make it ſubſtantially operative to the benefit and protection of *bona fide* creditors; in ſo much that a motive abſtractedly good and moral ſhall, by the preſumption ariſing upon this ſtatute, be *intended* fraudulent, wherever the grantor ſtands indebted at the time, againſt his *bona fide* creditors. That great lawyer cannot therefore well be underſtood to reſt this conſtruction ſo much upon any *particular* probability of actual fraud, as

upon the general policy of the ſtatute, the comparative merit of adverſe claimants, and an equitable balance of conſiderations, for his words are, " equity requires, that ſuch gift which defeats others, ſhould be made on as high and as good conſideration as the things which are thereby defeated." And he founded his opinion, in part, on an analogy to the principles on which it had been holden before the ſtatute of uſes, that feoffments made only in conſideration of blood and affection were unavailing to deſtroy an uſe raiſed on valuable conſideration, but ſhould deſtroy an uſe raiſed on conſideration of nature, becauſe in the laſt ſuppoſition both conſiderations are in *equali jure.*

If the Act 13 Eliz. were to be wholly dependant for its operation on the particular circumſtantial likelihood of exiſting fraud in the individual caſe, a creditor by the imperfection of his remedy upon the ſtatute, would be driven into equity for relief, where the aſcendency of his title would certainly be recognized; for, as was obſerved by Lord Northington in the caſe of *Partridge* v. *Gopp* (2) before cited, " no man

(2) Ambl. 598.

man is *there* conſidered as having ſuch a power over his property as that he can defeat his creditors by a conveyance *without conſideration.*" It may be remarked too, that the very *language* of the courts, declaring a deed fraudulent *as againſt* creditors, diſcovers it to be their ſenſe, that the ſtatute imports a *conſtructive* fraud irreſiſtibly concluſive in favour of *bona fide* creditors claiming againſt mere gratuitous conveyances (*a*); and, perhaps, the Lord Keeper may be underſtood in a ſenſe correſpondent to this notion, when in the caſe of *Fletcher* v. Lady *Sidley* (3), he expreſſed the inclination of his opinion to be, that, "fraudulent conveyances are *made ſo* only by the ſeveral ſtatutes made for that purpoſe."

(3) 2 Vern. 491.

(*a*) *Abſolute* fraud makes every inſtrument void to all intents and purpoſes. It ſearches, penetrates, and vitiates a tranſaction *fundamentally*. But if fraud in this *abſolute* ſenſe were intended by the ſtatute, with what propriety could we underſtand a deed fraudulent within the ſtatute to paſs a legal intereſt and bind a man's repreſentatives? So far is this from being conſiſtent with legal principles, that covin is held to vitiate every title, however legitimate in its creation according to the rules and ſolemnities of law.

But the partiality both of courts of Law and Equity to *bona fide* creditors is not extended to *all* that claſs of claimants in *equal degree*; it looſes ſo much of its force, where the demands of creditors ariſe upon *ſubſequent* contracts, as in ſuch caſes to require ſome acceſſory indications of fraud, if the previous conveyance be founded upon motives of ſuch probable ſincerity as the affections of conſanguinity. Where a man is indebted, the ſenſe of obligation to diſcharge his debts may be ſuppoſed to preſs unceaſingly upon a conſcientious mind; and where ſuch moral calls have loſt their force, no credit ought to be given for purity of motive under the moſt plauſible pretences of inducement. The very proximity of blood raiſes rather the idea of confederacy than affection in ſuch unconſcientious tranſactions. But a perſon *uninvolved* may with great reaſon and juſtice make proviſion for his children; and as the conſideration of blood is a motive of ſpecific virtue and agency in our law, it is conſiſtent with principles both moral and technical to ſtamp it with a legal preference where it is oppoſed to debts which *wholly* originate in

ſubſequent contracts, and are unattended with any particular marks of proſpective contrivance.

It appears, however, from the caſes already cited in this volume, that although *ſubſequent* creditors muſt yield to conveyances ſupported by ſuch privileged conſiderations (*b*), yet that where a caſe ſtands

(*b*) What relations are embraced within the ſcope of this privileged conſideration may be a queſtion. Conſiderations to raiſe uſes, and the force of the gift in frank marriage extended to collaterals, Litt. Sect. 17. Dyer 287. a.; but it ſeems that conveyances by tenants by chivalry, in conſideration of natural affection to collateral relations, was not within the 32 H. 8. c. 1. as childrens children, and all the poſterity in *linea recta*, were. Cro. Jac. 157. 6 Rep. 75. 77. and in Dyer 296. b. it was reſolved, that baſtards were not within the meaning of the ſaid act 32 H. 8. c. 1. which, by preferment of children, intends only the lawful progeny of the donor. See alſo *Thornton*'s caſe, Dyer 345. a. Conſideration of natural affection will not raiſe an uſe to a baſtard; and ſee Dyer, 374. a. S. P. Neither will equity ſupply the want of a ſurrender in behalf of a natural child. Prec. in Ch. 475. But ſee 1 T. R. 96. that baſtards are within the meaning of the marriage act; and the obſervation of Buller, J. that the rule that a baſtard is *nullius filius*, applies only to inheritances, and that it was ſo conſidered by Lord Coke.

unaccredited by theſe natural inducements, debts ariſing upon ſubſequent contracts will prevail, by force of the 13 Eliz. againſt ſpontaneous gifts, however juſtified upon moral reaſons. In the caſe of *Jones* v. *Marſh* (4), we have ſeen that Lord Talbot treated it as a queſtion, how far a court of Equity could ſet aſide family ſettlements, made without any conſideration, as fraudulent againſt a creditor who lends his money many years after the ſettlement; but enough, perhaps, has already appeared in this eſſay to ſhew that ſuch queſtion has been anſwered by the courts in favour of family ſettlements. It is to be regretted that the reporters of caſes, wherein creditors have claimed againſt voluntary ſettlements, have frequently omitted to take notice of the order of time in the date of the tranſactions. *Sagittary* v. *Hide*, reported by Vernon, leaves this fact unaſcertained, though we may in part collect from the argument of the counſel for the plaintiff, that the origin of the bond debt, on which the plaintiff claimed, was *poſterior* to the ſettlement made by the obligor; and then, according to the terms

(4) Ca. Temp. Talb. 65.

of the above diſtinction, the ſettlement could not be ſhaken.

A remarkable caſe was quoted at the bar in *Sagittary* v. *Hide*, which is there called *Lenthall*'s caſe, and which is to be found in Keble under the name of *Mountford* v. *Ranie* (5). Upon evidence to a jury in a trial at bar, it appeared that the plaintiff's title was under a judgment on a bond given by one G. to Sir John Lenthall, who was ſheriff, and leſſor of the plaintiff, which judgment was obtained on a *ſcire facias* againſt the heir and tertenants claiming under the anceſtor and obligor. The defendants ſet up a ſettlement by recovery to the uſe of truſtees for ſixty years, ſubject to the diſpoſition of the grantor, which conveyance was made fourteen years before the anceſtor became ſecurity for the priſoner. Keeling C. J. and Rainsford, J. *firmly* agreed, as the reporter ſays, in pronouncing the conveyance fraudulent, although the plaintiff had only *become* a creditor by the eſcape of the priſoner, and they affirmed it to be fraud appa-

(5) Keb. 499.

rent(*c*) in their directions to the jury. But Twyſden ſaid that there could be no ſuch intent at the time of the making of the ſettlement, the party not being *then* at all indebted, and afterwards only *collaterally*; and the verdict found by the jury correſponded with Twyſden's opinion. Whether the collateral object of the condition of this bond, and the circumſtance of its being grounded on no original debt or contract, would now in a court of judicature attach a preference to the opinion of Twyſden, is a point that may long remain in doubt.

It has been determined that where damages are recovered in an action founded in *maleficio* (6), as where a man is proſecuted by action for criminal converſation with the plaintiff's wife, a conveyance to truſtees for the payment of debts, though profeſſedly intended to avoid the conſequences of the ſuit commenced, ſhall not, in equity at leaſt, be treated as fraudulent

(6) *Lenkheer v. Freeman*, Eq. Ca. Abr. 149.

(*c*) It may not be unuſeful to obſerve that 'apparent' in its legal ſenſe is 'manifeſt.'

by

by the recoveror in the action. But though this case resembles that of *Mountford* v. *Ranie* above cited, in the circumstance of there being no direct original contract before the making the conveyance, yet all comparison is at an end when we consider that the point in the last-mentioned case, which was in chancery, was the legality of the preference given to *bona fide* creditors upon contract, over a claim for suppliciary damages. And it may be observed that in *Lewkner* v. *Freeman*, the plaintiff, though postponed to creditors upon pecuniary contracts, was let in upon the surplus after the creditors by contract were satisfied; but in *Mountford* v. *Ranie*, the claim of the bond creditor was *radically* subverted by the verdict of the jury in correspondence with Twysden's opinion. The import, however, of this case of *Lewkner* v. *Freeman*, must be bounded to its particular characteristic circumstances, and we must be cautious not to confound with its principle the case of a subsequent *creditor by contract* claiming against a conveyance to a trustee for the payment of *scheduled debts*. Nor, on the other hand, will the case support an inference that, after

after ſuit founded in *maleficio* has been inſtituted, a conveyance by the defendant for any *other* purpoſe than the payment of *bona fide* ſubſiſting debts upon contract, or for a plain valuable conſideration, can maintain itſelf againſt the plaintiff's ſubſequent title to damages by recovery in the action. The decree of the court vindicated only againſt the ſtatute 13 Eliz. the juſtice and legality of preferring the claims of preſent creditors upon pecuniary contracts, to a future poſſible right to accrue by a penal award. And we are to obſerve that the conveyance by the defendant in *Lewkner* v. *Freeman*, was after the action commenced but before the verdict. So that we can by no means infer from it that, in ſuch a caſe, ſuch a conveyance by a defendant of lands after verdict and before judgment, or of goods after judgment and before execution, would be effectual againſt the recoveror in the action (*d*).

Upon

(*d*) For this would be ſtrictly within the words of the ſtatute, being in delay of an execution; and ſee Brook tit. Colluſion, fo. 140. that a gift of goods between

judgment

Upon the whole, perhaps, the true ſpirit and exigency of the ſtatute 13 Eliz. circumſcribes the caſe within the ſtrict compaſs of its literal authority.

It ſhould ſeem that the diſtinction above taken between debts *precedent* and debts *ſubſequent* in the caſe of a conveyance by way of family ſettlement, or by way of proviſion or advancement for a child or children, may branch into a ſubdiſtinction between demands *fundamentally* originating *after* ſuch conveyance, and ſuch as ariſe upon an obligation prior in date to the conveyance, with a condition to perform ſome collateral act; for it cannot be ſaid, that an obligor in a bond, before the pecuniary demand ariſes by the forfeiture, can be ignorant of his liability or danger, ſo as to exempt him from the imputation of fraudulent intent upon this ſtatute of Eliz. And indeed if the conſtruction of this ſtatute can properly be influenced by tech-

---

judgment and *execution* in an action founded on a *tort*, is void at common law if there is no conſideration. See alſo Dyer 295. a. that an elegit was granted of lands which the defendant in *waſte had* on the day of the *verdict* given.

nical

nical reaſoning, it may be remarked that there is a preſent debt exiſting at law immediately upon the execution of the bond, the condition being a condition ſubſequent only, and operating merely upon the remedy, without in any manner changing, diminiſhing, or qualifying, the *debt* itſelf. And whether the perſon making ſuch voluntary ſettlement be principal or only ſurety in the bond can make no difference in this view. By attending to the caſe of *Mountford* v. *Ranie*, we perceive that Twiſden J. ſeemed to apprehend a difference, as to the application of the ſtatute, between the caſes wherein the ſubject matter of the condition is collateral to the obligation, and thoſe wherein, as in bonds for the payment of money, the ſum in the condition is parcel of the obligation; but the diverſity ſeemed not to meet the ſentiments of the other judges.

But it does not appear that damages ariſing upon a broken covenant, entered into previouſly to a voluntary ſettlement made by the covenantor before the breach, has been conſidered as entitled to the ſame extent of remedy or relief at law or in equity.

equity. The caſe of the *Eaſt India Company* v. *Clavel et al.* (7) is of ſome importance to this point, which caſe was ſhortly this. A. agreed with the Eaſt India company to go as Preſident to Bengal, and entered into a bond of 2000 *l.* penalty for the performance of articles; but before he ſet out he made a ſettlement of his eſtate, and, among other things, he declared the truſt of a term of one thouſand years, to be for the raiſing of 5000 *l.* as a portion for his daughter, who afterwards married J. S. whoſe fortune was 700 *l. per annum:* J. S. before his marriage had been adviſed by counſel that the portion was ſufficiently ſecured, and afterwards, on her death, had in compliance with her requeſt, expended 400 *l.* on her funeral, but had never made any ſettlement on her. A. afterwards embezzled the goods and ſtock of the company to a conſiderable value, and died; and the Lord Chancellor Harcourt decreed in favour of the bond only, to the amount of the penalty; but he would not for the ſake of the actual damage ſuſtained by the plaintiffs, and claimed by virtue of the articles, break in upon the ſettlement, which he declared

(7) Prec. in Chan. 377.

to

to be a reaſonable, prudent, and honeſt proviſion.

Statutes and recognizances which are obligations of record, by which all the fee-ſimple lands, which the conuſor had on the day on which the acknowledgment was taken, are liable, into whoſe hands ſoever they may afterwards come, whether by ſale or otherwiſe: ſo that by this ſort of ſecurity for a debt, all queſtion upon this ſtatute 13 Eliz. (*a*), as to lands, is avoided. But with reſpect to chattels the caſe perhaps is different, for although all leaſes and other goods and chattels of the conuſor or debtor are liable to be extended either in a freſh action of debt, or by execution immediately upon the ſtatute, which he has in his poſſeſſion or to his uſe at the time or on the day of the execution, yet it has been holden that a *bona fide* ſale for valuable conſideration, without notice after judgment, and before execution, is good at common law, and as it ſhould ſeem alſo within the ſtatute 13 Eliz. (8).

(8) Vide Sir *Gerard Fleetwood's* caſe, 8 Rep. 171.

(*a*) Such creditors by ſtatute are purchaſers within the 27 El. Vid. ſupra 393.

SECTION VI.

A DISTINCTION has been taken between caſes where conveyances are made by the party himſelf, and where the property is purchaſed in the name of a third perſon to whom the conveyance is *originally* made by the direction of the purchaſer. For, although there may well exiſt in the caſe laſt ſuppoſed ſuch badges of fraud as will entitle to *equitable* relief, it has been holden not to fall directly and legally within the proviſions of the ſtatute of 27 Eliz. (*a*). Thus where (1) L. purchaſed a manor in the name of Lady G.

(1) Lady *George's* caſe, Cro. Car. 550.

(*a*) Such voluntary donations by purchaſe and original conveyance are expreſsly within the ſtatute of 1 Jac. 1. c. 15. of bankrupts, ſo that the commiſſioners may ſell the lands ſo purchaſed in the name of wife, children, or friends. They are alſo expreſsly within the ſtatute 13 Eliz. c. 4. by which the lands of the King's officers and accountants were made liable for their debts to the crown.

his

his daughter; and afterwards kept courts and made leaſes in his own name, and continued to take the profits, and then ſold the manor to Sir S. M. and died, the title never having been queſtioned by Lady G. in the lifetime of her father; it was reſolved by the court, that it was not within the ſtatute 27 Eliz. c. 4. although there were many badges of fraud. And in the caſe of *Proctor* v. *Warren* (2), it was ſaid by Lord King, that he did not know, that it had ever been determined, that if a man being indebted, has an eſtate *originally* conveyed to his children by way of proviſion for them, it ſhould be ſubject to his debts. The Lord Keeper Wright inclined to that opinion in the caſe of *Fletcher* v. *Sidley* (3), where Sir C. S. having purchaſed a leaſe of a houſe in London, in which he dwelt, in the name of Sir F. W. and having taken a declaration of truſt to permit Sir C. to enjoy for life, and then to hold the remainder in truſt during the reſidue of the term, the queſtion before the court was, whether the leaſe of the houſe ſo purchaſed in truſt, in the name of

(2) Vin. tit. Fraud. Q. a. 2. Sel. Ca. in Lord King's time 78.

(3) 2 Vern. 490. but ſee 2 Vern. 70. *Kingdome* v. *Bridges.*

of Sir F. W., Sir C. S. being dead, ſhould be liable to the creditors, and brought into the account of the perſonal eſtate. It was inſiſted by the counſel for the defendant Lady S. that "the leaſe could not be aſſets of Sir C. S. becauſe he never had the *term* in him, but was only to enjoy for life, the remainder being given to the defendant, for the reſidue of the term. And that it being ſo ſettled, *upon the purchaſe*, it could not be liable to the creditors of Sir C.: for as, in his life-time, he might have given the *money* to the defendant, ſo, by the ſame reaſon, he might direct a conveyance to be made to her, or a declaration of truſt for her benefit. And it was ſaid, if a man purchaſes a *freehold* eſtate to himſelf for life, remainder over to another, ſuch remainder ſhall not be void or fraudulent, even as to creditors by bond or judgment; for it was a new pretence to ſay that a man may make a *purchaſe* fraudulently; a man might *alien*, on purpoſe to defraud his creditors, and the ſtatutes of fraudulent conveyances would reach ſuch alienation, but that as to *purchaſing* for another, a man might do it or let

it alone at his pleaſure;" and to that opinion the Lord Keeper inclined (*b*).

It

(*b*) We muſt be careful, however, not to infer from theſe caſes that a debtor can ſcreen his property from his creditors by taking an original conveyance to another *in truſt for himſelf*. It is plain that creditors might reach ſuch truſt property in a court of equity, and in caſes falling within the ſtatute 29 C. 2. of frauds and perjuries, by their executions at law. And where, from the circumſtances of the caſe, the ſuſpicion of a truſt for the perſon advancing the money ariſes, as in the caſe of *Stileman* v. *Aſhdown*, before cited, from the want of aptitude in ſuch original conveyance to the profeſſed object of the purchaſe, a court of equity will let creditors in upon the property. It ſeems, however, that where the object of ſuch original conveyance is the advancement of children, without any particular badges of fraud, the children will prevail in equity againſt the creditors of the parent, even though he were indebted at the time of the purchaſe: ſuch, at leaſt, appears to have been the opinion of Lord King in *Proctor* v. *Warren*, and the effect of the caſes above cited. The reader will obſerve, that in the caſes of *Lady George* and *Fletcher* v. *Sidley*, the property in diſpute was the remainder after the purchaſer's death, which was an entire new eſtate, that had never paſſed *through him*. But during the life of the purchaſer, as he had the beneficial intereſt for his life, ſuch intereſt was liable to his creditors: and this probably was the meaning of Lord Hardwicke,

It ſeems, alſo, that in ſome caſes, where a man has only a power over property in another's right, as where he is the huſband of an executrix or adminiſtratrix, his con-

---

wicke, when, in the caſe of *Stileman* v. *Aſhdown*, he put the caſe of a father purchaſing an eſtate for himſelf for his life, with remainder to his ſon in fee, and declared that this ſhould not prevail againſt the creditor. His Lordſhip ſuppoſed the father to be living. In the caſes above cited from Croke and Vernon, the diſpute was whether the *remainder* ſhould be aſſets for the ſatisfaction of the purchaſer's creditors.

Where the purchaſe by the father has been originally made in the ſon's name, the father's enjoyment of the rents and profits during his own life has not prevented the benefit of the advancement to the child, by creating an implication of truſt for the parent. See *Elliot* v. *Elliot*, 2 Chan. Ca. 231. and *Lamplugh* v. *Lamplugh*, 1 P. Wms. 111; where it was ſaid that the father's taking the profits muſt be intended to be done as guardian to the ſon. But this conſtruction cannot be made if the father takes the profits after the majority of the ſon. *Lloyd* v. *Read*, 1 P. Wms. 607. Where a purchaſe has been made by a father in his *own and ſon's* name, as in *Stileman* v. *Aſhdown*, it has been holden to be a weaker caſe in favour of the ſon, than where the conveyance is taken to the *ſon only*. And, accordingly, the ſon has been denied the benefit of ſurvivorſhip, as againſt a judgment creditor of the father. See the ſaid caſe of *Stileman* v. *Aſhdown*, 2 Atk. 481. *Pole* v. *Pole*, 1 Vez. 76.

veyance of any chattel intereſt, which was aſſets in her hands, notwithſtanding his being indebted at the time, cannot be fraudulent within theſe ſtatutes of fraudulent conveyances. Thus in the caſe of *Ridler* v. *Punter* (4), it was found upon ſpecial verdict, that W. and his wife being poſſeſſed in right of the wife, of a term which ſhe had as adminiſtratrix to C. her firſt huſband, and being indebted by contract, granted the term to Coleman, to the uſe of himſelf and his wife for their lives, and after to the uſe of Coleman himſelf. The creditor obtained judgment againſt W. for his debt, and an execution of *fieri facias* being awarded to the ſheriff, he for this debt of W. ſold the term to the plaintiff in that cauſe. The queſtion was, if the ſale were good, on which the opinion of the court was clearly in the negative; for the term, which was poſſeſſed by the huſband only in right of the wife as adminiſtratrix, while it continued in his poſſeſſion unaltered, was certainly not extendible for his debt; neither if the huſband himſelf had poſſeſſed it as executor, would it have been extendible for his proper debt.

(4) Cro. El. 291.

So

So that, by the court, this grant was out of the ſtatute 3 H. 7. c. 4. and all other ſtatutes of that nature (*c*).

In this caſe, though the grant of the term by the huſband, had the effect of altering the property, yet the thing conveyed veſted *originally* in the grantee, without paſſing through the huſband, or ever having been, for an inſtant, in his abſolute poſſeſſion; nor could he be ſaid to have parted with any property of his own, in any underſtanding or conſtruction whatever. He had merely a *power* over the thing, without any eſtate or ownerſhip whatever, upon which the claims of his creditors could attach. He had the right of alienation; but ſuch right of alienation was a power thrown upon him by the legal incapacity of his wife, and his prerogative as huſband, and not derived to him from any unity or community of eſtate or title.

If, however, he had granted the term, in truſt to be diſpoſed of as he ſhould

(*c*) A deſcription that clearly included the 13 Eliz. c. 5.

appoint the ſame, the *eſtate* in the thing would have been altered, and an equitable intereſt would have been ſet up in himſelf; and though in the former caſe, there being no fraud either at common law, or upon the ſtatutes, there ſeems to have been no ground for a court of Equity to interfere; yet in the caſe laſt ſuppoſed, there is authority for ſaying that, if the huſband were to make a *voluntary appointment*, under ſuch power reſerved upon the grant, a court of Equity would follow the rule upon theſe ſtatutes of fraudulent conveyances, by treating the appointment as void, and the intereſt as ſubject to the ſatisfaction of the huſband's debts. For by the alteration of the property, in this caſe, the huſband would have drawn to himſelf an eſtate in the thing, and his ſubſequent appointment would have operated as an equitable conveyance of the chattel intereſt, ſo as to let in the check which the law has impoſed upon all voluntary diſpoſitions.

This reaſoning is fortified by the caſe of *Aſhfield* v. *Aſhfield* (5), where it appeared on the Maſter's report, that Sir John Aſhfield

(5) 2 Vern. 267.

Aſhfield by deed had aſſigned the perſonal eſtate, to which the defendant his wife was entitled as executrix of her former huſband, to truſtees upon truſt for ſuch uſes, intents, and purpoſes, and for ſuch perſon and perſons as he by deed or will ſhould direct or appoint, and in default of ſuch appointment, in truſt for himſelf, his executors, adminiſtrators, and aſſigns, and afterwards by his will deviſed his eſtate to his wife and children, and died. The court determined that the property was altered, and the truſt being general, as he ſhould *direct or appoint*, he was *owner* in *equity*, and had the power and diſpoſal of his eſtate during his life. And becauſe the diſpoſition and appointment of it, which Sir John Aſhfield had made to his wife and children, was but in the nature of a legacy, and no notice was taken in the will of the power of appointing, it was decreed to be aſſets, and liable to the demands of creditors.

SECTION VII.

BUT in looking into the authorities on voluntary appointments under general powers, the principle of the case of *Ashfield* v. *Ashfield* last above cited appears capable of expansion; for whether the power had been executed by deed or will, the determination, according to the grounds of the resolution in *Townsend* v. *Windham* (1), and other cases, ought to have been the same. The circumstances of the case of Lord *Townsend* v. *Windham*, as far as it regards the point now under consideration, were as follow: J. W. A. being entitled to a very large estate for life, remainder to his first and every other son in tail male, remainder to his nephew W. Windham in tail, with limitations over, and having only daughters, and no probable expectation of sons, after the marriage of his nephew executed an indenture of demise, in performance (as it set forth)

(1) 2 Ver. 10.

forth) of certain promiſes and agreements made by the uncle before the marriage, whereby he let him into immediate poſſeſſion of part of the eſtate, without paying any thing for it; but W. Windham thereby covenanted that if by the ſettlor's death, without iſſue male, it ſhould happen, that W. Windham or any of the heirs of his body ſhould ever come into poſſeſſion of the eſtate, he would permit ſuch perſon as the teſtator ſhould, by deed or will in his lifetime, appoint for that purpoſe, to enter and receive the rents and profits of the eſtate, for ſo long a time as W. Windham ſhould enjoy it in the uncle's lifetime. Afterwards the uncle, by deed, directed all and ſingular the lands, tenements, manors, and hereditaments, and all his eſtate, title, right, and intereſt, to S. C. his heirs, executors, adminiſtrators, and aſſigns, to take the rents and profits thereof, from and immediately after his death, in truſt nevertheleſs to and for the ſole and ſeparate uſe of Catherine, his daughter, her heirs, executors, and adminiſtrators. After the uncle's death a bill was brought by his creditors for an account and ſatisfaction out of his aſſets.

An

And the queſtion was, whether Catherine the daughter ſhould take the benefit intended her by this appointment, or the intereſt under the power ſhould be liable to the creditors of the deceaſed,

Lord Hardwicke, in this caſe, ſtrongly denied the *diſtinction* which was attempted to be eſtabliſhed between an appointment by *will* and an appointment by *deed*, which, he ſaid, would elude the rule of juſtice by which the court was governed in theſe caſes. If, ſaid his Lordſhip, there is a power to execute by *deed or will*, though it be executed by *will*, it operates not *as a will* (*a*) to that purpoſe, but as an *appointment*, and not as an appointment of a man's own aſſets, but of the eſtate of another. And his Lordſhip finally decreed, that the daughter could have no ſpecific lien upon the fund, unleſs there was a ſurplus after debts paid; and that the appointment was void againſt the creditors, for whoſe benefit, whatever aroſe by the

(*a*) Vid. *Bath* and *Montague*'s caſe. 3 Chan. Ca. 100. per Lord C. J. Holt.

deed

deed out of the eſtate of W. Windham ought to be conſidered as part of the general aſſets of the deceaſed.

The ſame doctrine has prevailed where the ſubject of a power of appointment has been merely a *ſum of money*, as appears by the caſes of *Thompſon* v. *Towne* (2), *Laſcelles* v. Lady *Cornwallis* (3), *Hinton* v. *Toye* (4), *Pack* v. *Bathurſt* (5), and *Troughton* v. *Troughton* (6). It is to be obſerved, however, that theſe were all caſes of general powers by which the appointment was unreſtrained to any *particular* objects (*b*), for where the perſons to be benefited are deſcribed by the power, there is no pretence or ſemblance of ownerſhip

(2) Prec. in Chan. 52. 2 Vern. 319.
(3) Prec. in Chan. 232. 2 Vern. 465.
(4) 1 Atk. 465.
(5) 3 Atk. 269.
(6) 3 Atk. 656.

(*b*) In the caſe of *Hinton* v. *Toye*, 1 Atk. 465. the creation of the power was coupled with a recommendation to the appointor to appoint to charitable uſes, but it was left optional with him to purſue the recommendation or not. And the court declared that as he had the power of giving it to whom he pleaſed, he was undoubtedly the owner of it; and the intereſt was decreed to be liable to his creditors, though an appointment had been made to the children of a poor clergyman, and expreſſed to be in purſuance of the direction of the perſon giving the power.

in

in the appointor, ſo as to raiſe a title in his creditors as againſt his voluntary appointment. But where a man has ſuch a power of diſpoſition over an eſtate, or intereſt as enables him to veſt it in his own repreſentatives, a court of equity will conſider this as an *ownerſhip*, for, as was ſaid by Mr. Verney, Maſter of the Rolls, in the caſe of *Hinton* v. *Toye*, there are three ways in which property may be exerciſed,—by enjoyment in one's own right, by transferring a right to another, and by repreſentation.

Where a general power of diſpoſition is given to a man to be exerciſed or not as he pleaſes, until he executes the power he does nothing to affirm (*c*) the intereſt in himſelf, ſo as to conſtitute it aſſets for the

(*c*) But where he, from whom the eſtate moves, reſerves a power in any manner to limit any eſtate or eſtates by his will, the whole fee ſimple is in him; ſo that any act he does to diſpoſe of the eſtate will hinder him from executing his power, per Holt C. J. in *Bath* v. *Montague*'s caſe; vid. 3 Chan. Ca. 100. and if he do no act and make no will, the fee ſimple, of courſe, deſcends through him.

benefit

benefit of his creditors. But where he has made a voluntary appointment, the court of Chancery conſiders a tranſitory ownerſhip as gained to appointor by this act of diſpoſition, but ſtops the intereſt in its paſſage to the appointee, and turns it into that channel in which in conſcience it ought to go.

SECTION VIII.

THE validity of bonds are more frequently the ſubject of diſcuſſion and determination in courts of equity than of law: for every bond imports a ſufficient conſideration at law, but a court of equity repels a voluntary bond from its rank, and poſtpones it to debts (*a*) upon valuable contracts (*1*). While the obligation reſts merely in contract, there is no opportunity for a creditor of the obligee to diſpute its force in a court of law, for until it has paſſed by regular litigation *in rem judicatam*, there is no proper ſubject of conteſt between the oppoſite claimants, at leaſt during the life of the obligor. When the

(1) Prec. in Chan. 17. 1 Atk. 293.

(*a*) There is a caſe in Barnadiſton, wherein it is ſaid that the court was of opinion that a bond given by the eldeſt ſon, in purſuance of a promiſe made by him to his father a little before his death, to the executor, by way of proviſion for his younger brothers and ſiſters, cannot be called a voluntary bond. Barnard. 397. *Eales* v. *Gee*.

voluntary

voluntary obligee is prepared to graſp the property by his execution, he is then in a predicament to diſpute, or to have his claim diſputed by a creditor of his obligor, and the ſubject of an action between them may riſe out of their contending executions, to decide their pretenſions upon the foot of fraud within the ſtatute of Elizabeth.

In actions againſt executors, the queſtion of fraud within the ſtatute 13 Eliz. upon voluntary and colluſive obligations, is ſooner matured; for as the executor may in ſome caſes plead an outſtanding bond in anſwer to actions upon the debts of his teſtator (*b*), an occaſion is then afforded to

(*b*) In *Philips* v. *Echard*, Cro. Jac. 8. 35. where an executor pleaded a bond outſtanding againſt his teſtator, beyond which he had not aſſets, and omitted to ſay that it was for a true and juſt debt, the plea was holden good without ſuch an averment, for it was ſaid it ſhould be intended that it was *pro vero et juſto debito* until the contrary was ſhewn. But in ſeveral caſes the omiſſion of the averment above-mentioned has been holden a ſufficient ground for a ſpecial demurrer; vid. 9 Rep. 109. Cro. Jac. 182. 625. But it ſhould ſeem that the addition or omiſſion of this averment cannot ſubſtantially affect the caſe, though perhaps the form of the replication may in ſome meaſure depend upon it; vid. 1 Brownl. 50.

the

the *bona fide* creditor to controvert the verity and honesty of the contract on which the pretended obligation was grounded. But the contending claims of creditors upon voluntary and valuable debts and obligations, as they are generally implicated with matters of discovery and account, are, as before remarked, usually agitated in courts of equity, where a rule very favourable to justice is tenaciously observed of postponing all voluntary instruments, however binding in their nature, to debts arising upon honest and valuable considerations. The case of *Loeffes* v. *Lewin et al.* (2), is one of the strongest in the books to shew the preference which courts of equity give to the strength of the actual consideration above that which the obligatory form of an instrument supplies; the circumstances of which case, as far as regards the present question, were briefly as follow: A man, upon the marriage of his wife's daughter, to whom he was indebted, but not to the amount of the portion expected by the intended husband, made a verbal promise to the husband to pay him four thousand pounds, and paid him all but

(2) Prec. in Chan. 370. Gilb. Eq. Rep. 32. 2 Eq. Abr. 556.

fifteen hundred pounds, and ſome time afterwards executed a bond for payment of the fifteen hundred pounds, which he ſhewed, together with his will, to the huſband, to whom, however, he did not deliver it, but kept it by him until his death. It was afterwards found with his will. His creditors upon ſimple contract took out adminiſtration, and the huſband becoming a bankrupt, *his* creditors exhibited their bill to have the benefit of the bond: but Lord Chancellor Harcourt decreed, that this bond was to be looked upon as a voluntary contract, being not made in purſuance of any agreement in writing on the marriage(*c*), nor put into the power of the huſband, and that, therefore, it was to be regarded as fraudulent and void as againſt creditors even upon ſimple contract.

If

(*c*) It ſeems that courts of equity will not compel execution of a *parol* promiſe made *after* marriage, in purſuance and confirmation of a *parol* engagement entered into *before* marriage, even as againſt the party himſelf or thoſe voluntarily claiming under him, unleſs poſitive fraud and circumvention can be eſtabliſhed in proof; vid. *Montacute* v. *Maxwell*, 1 P. Wms. 618.

If this caſe had wholly reſted upon the circumſtance of the want of validity in the promiſe which was made upon the marriage, (as being only by parol and void within the ſtatute of frauds), it would be carrying the exigency of a valuable conſideration to a rigorous extent in equity, and beyond the ſcrupuloſity of the courts of common law: for we have ſeen in the caſe of *Lavender* v. *Blackſtone* (3) ſo often before cited, that a promiſe by an infant, though performance thereof is not compellable at law, is held to be a conſideration for a ſubſequent ſettlement ſufficient to uphold it againſt creditors or purchaſers: and by

(3) 2 Lev. 247.

But in the ſame caſe reported in 1 Str. 236. it was ſaid by Lord C. J. Parker upon the amended proceedings, that the caſe was very much altered from what it was at firſt, when it ſtood *purely* upon the *parol* promiſe, ſince it appeared that there was, in truth, a promiſe in *writing after* marriage grounded upon the *parol* promiſe before. That it had been frequently determined that a *parol* promiſe *on* marriage was a ſufficient conſideration to ſupport a ſettlement after marriage; ſo was it a ſufficient conſideration to eſtabliſh a *promiſe* in *writing* after marriage. In *Brownſmith* v. *Gilborne*, 2 Str. 738. the perſons directing the ſettlement after the marriage had neither of them made the parol promiſe before the marriage.

a ſubſequent caſe (4) reported alſo by Levinz, it appears, that where, the wife having a real eſtate, and the huſband being in debt, he promiſed her, that if ſhe would join with him in the ſale of her land, and permit him to receive the money for the uſe of his trade, he would leave her 400 *l.* at his death: this promiſe, though not binding, was held to be conſideration enough, to ſupport an obligation made ſix months afterwards to a ſtranger, conditioned to pay his wife 300 *l.* after his death. And, by the direction of Hale, C. J. the jury found the obligation not fraudulent againſt creditors. The reader will recollect the caſe of *Dundas* v. *Dutens* (5), cited in a former part of this eſſay, wherein the ſtatute of frauds being inſiſted upon as vacating a parol agreement before marriage, ſo as to deſtroy the valuable foundation for the ſettlement made after marriage, purſuant to ſuch agreement, the Lord Chancellor Thurlow would not allow the objection to prevail. We obſerve, however, that the invalidity of the engagement before marriage ariſing from the want of a written inſtrument was not the *ſingle* ground of the deciſion of the

(4) *Clerk* v. *Nattleſhip*, 2 Lev. 148.

(5) 1 Ves. Jun 196.

above-mentioned caſe of *Loeffes* v. *Lewin*, but that the non-delivery of the deed made after marriage was among the reaſons of the decree, and, perhaps, the moſt prevailing; for this has always been regarded in equity as a leading feature of fraud, and, if not quite enough of itſelf to vitiate a tranſaction in the conſideration of the court, yet as lending great ſtrength to ſlight argumentative circumſtances.

(6) Prec. in Chan. 182.

Thus in the caſe of *Ward* v. *Lant* (6), where a father executed a voluntary bond to one of his daughters, without any condition and payable immediately, but always kept it by him, and ſome proof alſo appeared of its having been given merely to ſcreen himſelf from taxes; the bond was *ſet aſide* even againſt *deviſees*. How far the force of the two ingredients in the caſe of *Loeffes* v. *Lewin* will juſtify the decree upon the principles of other caſes, the reader may determine for himſelf, after carefully diſtinguiſhing between the cumulative force of circumſtances that preſs towards the ſame concluſion, as in the caſe of *Ward* v. *Lant*, and the divergent inferences

inferences from two unconnected facts that, without fortifying each other, agree only in their common tendency to invalidate the inſtrument.

We are to obſerve, alſo, that though in *Ward* v. *Lant*, the retention of the bond in the hands of the obligor, when co-operating with other teſtimony, induced the court to ſet aſide the inſtrument as againſt deviſees, yet that in other caſes, where it has occurred as the ſingle objection, it has not given preponderancy to the claims of other volunteers claiming under ſubſequent inſtruments (7); and that though the bond, in the caſe of *Boughton* v. *Boughton*, where it was kept in the hands of the obligor, was declared to be bad as againſt creditors, if any ſuch had diſputed it, yet that, in that caſe, being at the ſame time voluntary, it would, without adverting to the fact of retention, have been clearly unavailing as againſt all perſons claiming upon *valuable* conſideration.

(7) 1 Atk. 625. *Boughton* v. *Boughton.*

Thus it ſeems to be clear that voluntary bonds will take place before legacies, and are not to be diſputed by executors or adminiſtrators, unleſs ſome creditor will thereby be

deprived of his debt; and in the before-mentioned caſe of *Boughton* v. *Boughton*, we find the court of Chancery carrying its reſpect for theſe ſolemn ſecurities in favour of volunteers ſo far, as even where the bond had never been delivered to the obligee, to ſet it up againſt the ſubſequent voluntary diſpoſitions of the obligor (*d*). And where a voluntary bond has been given up to be cancelled, a court of Equity has compelled execution, if no creditor in the caſe, and where there was a meritorious conſideration to ſupport the inſtrument; a ſtrong inſtance of which is furniſhed by the caſe of *Beard* v. *Nutthall* (8), where, a voluntary bond after marriage having been entered into by a huſband, to ſettle a jointure upon his wife, and the jointure being ſettled and the bond

(8) 1 Vern. 427.

(*d*) It is true, that in *Naldred* v. *Gilham*, 1 P. Wms. 577. where an old woman had executed a voluntary deed, which ſhe kept by her, and her nephew had *ſurreptitiouſly* gotten a *copy* of the deed, the original of which the lady afterwards deſtroyed; Lord Macclesfield reverſed the decree of the Maſter of the Rolls, who had declared in favour of the copy; but that caſe ſtands upon its particular circumſtances.

given

given up to be cancelled, and the wife, after the husband's death, being evicted of the land settled, the court decreed the jointure to be made good out of the husband's personal estate. The various cases (9) of account and satisfaction decreed to plaintiffs in the court of Chancery, on bonds given as *præmia pudicitiæ* are examples of the same kind. That court, too, has sometimes regarded bonds as standing *wholly* upon *good* consideration, though the sum secured has been greater than the sum given; for it was said by Lord Hardwicke, in the case of *Blount* v. *Doughty* (10), that the court would not measure the consideration of debts of *that* kind, by exact rules of proportion of value, but if such a contract was fairly entered into, without any circumstance of fraud, it must be looked upon as made upon a good consideration. To be sure, added his Lordship, where there is any symptom of fraud, or intention to cover something from creditors, the court will not suffer it to prevail. It seems, too, that, though the *identical* consideration of a bond fail, yet if the obligee has the full benefit of his agreement, the

(9) Vid. Eq. Abr. 87.

(10) 3 Atk. 434.

court of Chancery will ſupport the obligation (11). But it has been laid down as the rule of that court, that where a bond is claimed in conſideration of money lent, and the obligee fails in proving the actual conſideration alleged, he ſhall not be allowed afterwards to ſet up the inſtrument as a *voluntary* bond upon *meritorious* conſideration (12).

(11) Vid. Eq. Abr. 85. and Chan. Rep. 49.

(12) 1 Atk. 294.

SECTION IX.

WITH regard to judgments by confeſſion, where they are given by way of collateral ſecurity, it is clear, upon principle, that they can ſtand in no higher conſideration than bonds, as to their validity within theſe ſtatutes. If the bond be voluntary, a judgment confeſſed upon it will likewiſe be voluntary. Thus in the caſe of *Fairebeard* (1) v. *Bowers*, where a freeman of London, having three baſtard children by J. F. entered into a bond, and afterwards confeſſed a judgment to her for 1,000 *l.* defeaſanced for payment of 500 *l.* within ſix months after his death, to be divided equally among the children; it was decreed, that the judgment, being voluntary, ſhould not prevail againſt debts by ſimple contract, nor againſt the claim of the widow for her cuſtomary part.

(1) Prec. in Chan. 17. 2 Vern. 202.

And in a caſe (2) before Holt C. J. where goods having been taken in execu-

(2) Holt, 327. *Sanders* v. —

execution, which were in the poſſeſſion of the plaintiff under a bill of ſale from G. the plaintiff brought his action, and the defendant inſiſted, that the bill of ſale was fraudulent againſt him, he being a creditor by judgment, it was ſaid by the Chief Juſtice, that if the judgment was upon a *point tried*, the conſideration for it needed not to be proved, but it ſhould be intended good; but if it were a judgment by confeſſion, it ought to be proved to have been for a juſt debt, otherwiſe it ſhould not overthrow the ſale, even though the ſale were fraudulent, for it is good againſt all but creditors for a juſt debt, *bona fide* due.

But although a judgment be confeſſed upon a juſt debt, it may yet be fraudulent; for though the debt be *bona fide* due, the judgment *quoad* other creditors may be *mala fide confeſſed*, *i. e.* may be confeſſed with intent to delay, hinder, or defraud others of *their* juſt and lawful actions, and ſuch intent is to be collected from the circumſtances of each caſe. But it ſhould always be remembered that under the ſtatute 13 Eliz. c. 5. the *mere* preference

ence of one creditor to another is not a ground to impeach the tranſaction (*a*), although in certain caſes a more rigorous rule in reſpect to theſe preferences has been generated by the policy of the bankrupt laws (*b*). Though a man be ſued

(*a*) Vid. the caſes of *Holbird* v. *Anderſon*, 5 T. R. 235. and *Eſtwick* v. *Caillaud*, ibid. 420. and vid. Jones 62. Recovery with legal cauſe, though with conſent, not covinous.

(*b*) It ſeems that every fraudulent conveyance by deed, within theſe ſtatutes 13 and 27 Eliz. is an act of bankruptcy, vid. *Haſſel* v. *Simpſon*, Co. B. L. 85. and conſequently fraudulent againſt the aſſignees, but the converſe of this poſition will not hold. A man, variouſly indebted, may convey all his property to a particular creditor whoſe debt covers their value, without bringing himſelf within the ſtat. 13 El. c. 5. unleſs the tranſaction be diſtinguiſhed by other indications of fraud; but ſuch a conveyance by a trader is a fraud upon the general policy and deſign of the bankrupt laws, and will therefore be an act of bankruptcy, and fraudulent againſt the aſſignees. 1 Burr. 407. 477. Dougl. 282.

And an aſſignment of all a trader's effects for the benefit of all his creditors has been holden an act of bankruptcy, and conſequently fraudulent as againſt the aſſignees, unleſs *all* aſſent to the deed, though the perſons executing the deed can never themſelves ſet it upas an act of bankruptcy. Vid. Co. B. L. 86. But ſuch acts are not *neceſſarily* fraudulent within the ſtatute 13 Eliz. c. 5. They are

ſued to judgment and execution by one of his creditors, it has been holden that he may yet

---

are fraudulent within the bankrupt laws from an inferred contemplation of bankruptcy in the conveyer, which principle of conſtruction will extend to a conveyance of only *part* of a trader's effects to a fair creditor. 2 P. Wms. 427. 13 El. c. 7. ſ. 12.

The acts conſtitutive of the fraud within the bankrupt laws, whereon a commiſſion can be grounded, are declared and defined by poſitive laws, and cannot be taken by inference; therefore, although many fraudulent tranſactions within the ſtatutes of fraudulent conveyances are not of themſelves acts of bankruptcy, yet it may be ſaid that all acts of a debtor which are *fraudulent* within the ſtatute 13 El. c. 5. are void as againſt aſſignees, under the ſtatutes of bankrupts. And the true reaſon, as appears from the caſes, why many tranſactions are fraudulent within the ſtatutes of bankruptcy, which are not ſo within the ſtat. 13 Eliz. c. 5. of fraudulent conveyances, is becauſe whatever is done in *proſpect* of bankruptcy, and has a plain tendency to obviate its conſequences, is done with premeditated oppoſition to a ſtatute law. The ſtatutes of bankruptcy anxiouſly provide for the *equality* of creditors; a preference, therefore, given to a creditor in immediate *contemplation* of bankruptcy, *merely as* a concerted preference, is fraudulent within theſe ſtatutes, vid. *Ruſt* v. *Cooper.* Cowp. 629. But that ſuch preference is not *of itſelf* fraudulent within the 13 Eliz. c. 5. appears from the caſe of *Eſtwick* v. *Caillaud*, 5 T. R. 420. It ſeems upon the whole, that we may ſafely ſay, that every fraudulent

yet give the preference to another by voluntarily confeſſing judgment to him, if there are no diſtinctive badges of fraud to

---

conveyance or act within the ſtat. 13 El. c. 5. is fraudulent within the ſtatutes of bankruptcy, and every fraudulent conveyance by *deed*, within the 13 Eliz. c. 5. is of itſelf an act of bankruptcy.

It has before been obſerved, that a voluntary conveyance by a man, not indebted, for the benefit of his children, or by way of general family ſettlement, after marriage, is not fraudulent as againſt ſubſequent creditors, within the ſtatute 13 Eliz. But by the expreſs letter of the ſtat. 1 Jac. c. 15. ſect. 5. ſuch a conveyance is fraudulent as againſt aſſignees under a commiſſion of bankruptcy. Vid. *Walker* v. *Burrows*, 1 Atk. 94. And it has been before obſerved, that if a man indebted takes an *original* conveyance to any of his children, under a purchaſe, in their names, ſuch eſtate is not ſubject to his debts, within the 13 Eliz. c. 5. but that, by an eſpecial clauſe, ſuch original conveyance without conſideration, whether the purchaſer be indebted or not, is brought within the ſtatute 1 Jac. c. 15. It ſhould be obſerved, however, that where a man, not indebted, and not a trader at the time, makes a voluntary ſettlement on a child, and afterwards *becomes* a trader and a bankrupt, this ſettlement is not liable to the bankruptcy. Vid. *Lilly* v. *Oſborn*, 3 P. Wms. 298. Though it ſeems by the late caſe of *Fryer* v. *Flood*, 1 Bro. C. R. 160. that *both* theſe circumſtances muſt concur to protect the tranſaction, and that if the party be a trader at the time of the ſettlement, his ſolvency will not ſave him from the operation of the ſtatute 1 Jac. 1. c. 15.

vitiate

vitiate the tranſaction (*c*); and the *inferiority of the rank of the debt* upon which ſuch judgment is voluntarily confeſſed is not, of itſelf, a badge of fraud. But it is plain that, after the debtor's deceaſe, ſuch voluntary preference by the executors can only be ſhewn among creditors in *equal degree*, and an executor may not voluntarily confeſs a judgment, to ſimple contract creditors, if he has notice of a ſpecialty demand (3); neither, as it ſeems, if a ſuit has been commenced, whether in a court of law or equity (*d*) can an executor make a *voluntary payment* of *any* debt.

(3) 1 T. R. 690. *Sawyer* v. *Mercer.*

(*c*) If an executor keeps a judgment on foot by fraud, it is bad at the *common law*. Vid. *Peachy* v. *Spelman*, Vent. 329.

(*d*) Vid. 3 P. Wms. 401. note F. and Caſ. Temp. Talb. 218. *Morrice* v. *Bank of England*, affirmed on an appeal to the Houſe of Lords. Vid. Bro. P. C. 287. And ſee in *Smith* v. *Styles*, 2 Atk. 387, Lord Hardwicke's confirmation of the doctrine that a decree of the court of Chancery is equal to a judgment at law, and conſequently that *that* which is firſt obtained ought to be firſt ſatisfied.

SECTION X.

An important and curious part of the preſent ſubject is the nature and effect of that ſort of conſideration which ſprings out of a tranſaction ſubſequent to a voluntary and fraudulent conveyance and reſtores ſuch conveyance to its legal validity, under the ſtatute, 27 El. c. 4. as an authentic channel, through which the title may be conveyed. Which doctrine is thus explained by the Bench in the caſe of *Prodgers* v. *Langham* (1). "Although a deed be fraudulent in its creation and void (*a*) as againſt a purchaſer, yet it may become good by matter *ex poſt facto*; as if a man makes a feoffment by covin, and the feoffee makes a feoffment over for valuable conſideration, and then the firſt feoffor enters and makes a feoffment upon valuable conſideration,

(1) 1 Sid. 133. 1 Str. 243.

(*a*) The expreſſion in the original is "*voidable by a purchaſer*," which ſeems not accurate.

the

the feoffee of the firſt feoffee ſhall retain the land, and not the feoffee of the firſt feoffor; for although the eſtate of the firſt feoffee was in its *creation* covinous, and ſo void as againſt a valuable purchaſer from the firſt feoffor, yet when he enfeoffs another upon valuable conſideration, that feoffment ſhall be preferred to a *ſubſequent* feoffment by the firſt feoffor.

The ſame doctrine was maintained by Lord Chief Juſtice Holt in *Andrew Newport's* caſe (2), where, on an ejectment brought by the aſſignee of the mortgagee, it was objected, that it did not appear that any money was paid upon the original mortgage; for which reaſon it was contended, that it muſt be conſidered as fraudulent, and being fraudulent in its creation, though the aſſignee paid a valuable conſideration, yet that the fraud ſtill adhered to and vitiated the tranſaction as againſt the defendant, who was a ſubſequent purchaſer under the original mortgagor for a valuable conſideration. But it was reſolved that the firſt mortgage was good between the parties, and *that* being ſo,

(2) Skinner's Rep. 423. The ſame caſe is reported in 3 Lev. 387. by the name of *Smartle* v. *Williams.*

ſo, when the firſt mortgagee aſſigned for valuable conſideration, it was the ſame as if the firſt mortgage had been made upon a valuable conſideration, for his aſſignee ſtood in his place, and having paid a conſideration of value, was within the proviſo of the ſtatute 27 Eliz. c. 4. So, in the caſe of *Wilſon* v. *Wormal*, it was ſaid by Chief Juſtice Cook, that if leſſee for years aſſign over his term by fraud to defeat an execution, and the aſſignee aſſign over the premiſes to another *bona fide*, they are not liable to execution in the hands of the ſecond aſſignee (3).

(3) Godb. 161.

And it is to be obſerved, that the valuable conſideration, whenever it accrues, entirely obliterates the fraud, ſo that it can never again, in any ſhape, affect the tranſaction. Thus a purchaſer for value from a voluntary grantee, has a good title againſt all ſubſequent purchaſers for valuable conſideration from the original grantor, and the voluntary grantee of a valuable purchaſer ſhall avoid a former voluntary conveyance by his grantor's vendor, for he ſupports himſelf

ſelf by the ſtrength of his grantor's title. In the caſe of *Goodtitle* v. *Moſes* (4), the title of the valuable purchaſer from the volunteers was too late in its commencement: it was anticipated *pro tanto* by the title of the leſſee, who was a purchaſer *quoad* his leaſe for valuable conſideration from the voluntary grantor, before the title by purchaſe from the voluntary grantees accrued to the plaintiff.

(4) 2 Blac. 1019.

But if a man makes a voluntary conveyance to A. and afterwards convey the ſame eſtate without conſideration to B. and the ſecond grantee conveys to a purchaſer for valuable conſideration, it is plain that the title of the firſt grantee is good againſt the purchaſer from the ſecond; for the firſt voluntary conveyance was good between the parties, and thereby the eſtate paſſed in law to the voluntary grantee, ſo that the ſecond grantee had no eſtate to convey to the purchaſer; for the ſecond attempt to convey the eſtate, without valuable conſideration, was wholly abortive. And the reſult would obviouſly be the ſame, if the firſt grant were a mere bounty to a ſtranger

ſtranger to the blood of the grantor, and the ſecond were made upon the conſideration of natural affection, and with the laudable deſign of providing for a family: in ſuch a caſe a purchaſer from the firſt grantee would prevail againſt the ſecond. This (5) was decided in a caſe ſent out of Chancery for the opinion of the Judges, where, a man ſeized in fee, having made a voluntary conveyance with power of revocation, afterwards without effectually revoking the firſt conveyance, covenanted to ſtand ſeized to the uſe of his nephew for his advancement in life, who ſold the eſtate to a purchaſer for valuable conſideration; and the Judges were of opinion that the purchaſer had no title. This caſe has before been cited in a part of this treatiſe (6), wherein the qualifications of the purchaſer, to entitle him to the patronage of the ſtatute, were under diſcuſſion; and the queſtion is evidently in ſubſtance the ſame whether we are conſidering the title of the ſecond grantee, or of the vendee under him.

(5) *Dame Burg's caſe*, Moore 602.

(6) Vid. ſupra, 383.

Levinz, in his report of *Andrew Newport*'s caſe by the name of *Smartle* v. *Williams* (7), ſubjoins a query of his own, and adds "that the contrary had been holden;" and by a note in the margin of that reporter we are referred to Sir Thomas Raymond's Reports (8), for an example of a reſolution oppoſed to this doctrine of conſiderations by matter *ex poſt facto*. The name of the caſe, correſponding with this reference, is *Eden* v. *Chalkhall*, which, upon examination, will be found to eſtabliſh nothing more than the above cited caſe of *Dame Burg*.

(7) 3 Lev. 388.

(8) Sir Tho. Raym. 35.

In this caſe of *Lady Burg* we obſerve, that the perſon making the ſucceſſive voluntary grants was a mere truſtee; we muſt ſuppoſe him, therefore, to make the firſt grant without the privity and conſent of his *ceſtui que* truſt; for had that been the caſe, he was incompetent even for a *valuable* conſideration to defeat his former voluntary conveyance, for he would, in ſuch caſe, be *virtually* a different perſon from the firſt conveyer. We obſerve too,

too, that the great queſtion in the caſe was, whether the conveyance to the nephew, being in conſideration of blood and affection was capable of defeating a former voluntary grant; for if the conſideration *had* been effectual, the conveyance without notice of the truſt would have carried the eſtate diſcharged of the truſt in equity. Nothing, however, can have this effect in equity but a *valuable conſideration*, and this was *not* a valuable conſideration; ſo that the firſt voluntary grantees retained the legal eſtate ſubject to the truſt for *Lady Burg*, the plaintiff in equity. Had the ſecond conveyance by the truſtee been ſupported by a valuable conſideration, the intereſt of the *ceſtui que* truſt would have been defeated, notwithſtanding the purchaſer from the perſon to whom the ſecond conveyance was made (10) had notice of the original truſt, for thoſe rules of derivative ſecurity, by a ſort of ſubſtitution of title, which, with reſpect to legal eſtates, has been adverted to a few pages above, as affording protection to voluntary claimants, are applicable in *equity* to volunteers and perſons coming

(10) See the caſe, Moore 602.

in with notice. Thus if a man purchaſe with notice of articles from a purchaſer without notice, he is protected in equity by the title of his immediate vendor, and is ſafe under the ſhelter of another's innocence. And the ſame acceſſory conſideration ariſing from matter *ex poſt facto* will legitimate in a court of Equity a corrupt antecedent claim for the ſake of a ſucceeding innocent purchaſer deriving through it. As, where a purchaſer, *with* notice of precedent articles, ſells to a purchaſer for valuable conſideration *without* notice, the ſecond ſale will be good in equity. Though, perhaps, the ſecond vendor may be liable to make ſatisfaction to the covenantee in the articles. And a volunteer claiming under one who has purchaſed *bona fide* after articles entered into by the vendor to another is protected by the ſufficiency of title in his own immediate grantor.

Every conſideration which will ſupport the claim of a purchaſer againſt a prior voluntary conveyance by his vendor, will alſo bring him within the proviſo of the ſtatute

ſtatute where he takes his title from the voluntary grantee. A ſubſequent *ſettlement*, therefore, eſtabliſhes and ratifies an antecedent voluntary conveyance, where the intereſt is drawn out of the grantee upon the conſideration of marriage; and every party to the deed, within the ſcope and purpoſe of the ſettlement, is certainly a purchaſer for valuable conſideration to this effect. But the caſes have extended the benefit of this rule to an extreme latitude in favour of *marriage*, ſo as to embrace within its protection, not merely a purchaſer by marriage, who claims under an *actual ſettlement* of the property which was the ſubject of a former voluntary conveyance to the ſettler, but even ſuch as claim by virtue of a conſtructive conſideration, founded only upon *probable inducement and expectation*; for where long poſſeſſion of, or a notorious and undiſputed title to, an eſtate under a voluntary conveyance has given ſuch credit to a party with the friends of his intended wife, as apparently to draw from them their conſent to the marriage, the union which has afterwards taken place has been regarded as founding itſelf upon theſe

appearances, and as being a ſort of implied purchaſe of an intereſt in property, which becomes implicated in the preſent ſupport of the new eſtabliſhment, and in the riſing hope of the future family. An early authority to this effect is the caſe of *Prodgers* v. *Langham* (10) reported in Siderfin, which was thus:

(10) 1 Sid. 133.

A. being ſeized in fee of lands in the county of N. made a leaſe of his lands to B. and C. in truſt for his only daughter and heir for twenty-one years, to the intent that the profits might be applied to her maintenance until her marriage, and if ſhe married Poulton, or any other, during the life of B. with his conſent and liking, then in truſt for her during the reſidue of the term; the daughter did not marry Poulton but married the plaintiff, whom A. diſapproved of at firſt; but he became, afterwards, reconciled to the match, and lived and died with the huſband and wife. The court held in this caſe, 1. That the conveyance to the daughter was a voluntary conveyance, and would have been void as againſt the defendant,

defendant, a ſubſequent purchaſer for valuable conſideration, within the ſtatute of fraudulent conveyances, if the *marriage* had not intervened. But, 2. That although the conveyance was void in its creation as to purchaſers, yet when the marriage took effect, the firſt ſettlement remained no longer voluntary, as it was in its creation, but became ſupported by a valuable conſideration, and, by conſequence, unimpeachable; inaſmuch as the marriage was an advancement of the daughter, and he who married her was *induced thereto by the proſpect of this proviſion*. And, 3. They reſolved, that B. might agree to the marriage at any time during his life, and though he at firſt diſapproved, yet his ſubſequent agreement operated by relation to the time of the marriage.

Kirk v. *Clark* (11) a remarkable caſe of the ſame order was determined in Chancery by Lord Chancellor Cowper; and was thus in effect: Sir N. C. tenant for life of copyhold lands, with the remainder to his wife for life, the reverſion to

(11) 1 Prec. in Chan. 275.

to himſelf in fee, made a ſurrender of the reverſion to his eldeſt ſon in tail, the remainder to his own right heirs; which ſurrender was made to his ſon, with intent only to leſſen the fine he would have paid in caſe the reverſion had come to him by deſcent from his father. Afterwards, upon a treaty of marriage between the ſon and a young lady, who was to have 2,000 *l.* for her portion, her friends, underſtanding that the father had a leaſehold eſtate, beſides the copyhold, propoſed to have both ſettled, but told him that they relied chiefly upon the copyhold as the proper equivalent for her fortune; upon which Sir N. C. told them that he *had* ſettled that *already* on his ſon by a ſurrender; and thereupon an agreement was made and reduced into writing, for ſettling the leaſehold eſtate upon the lady and the iſſue of the marriage, reciting the intended marriage and portion; and that in conſideration thereof the leaſehold was agreed to be ſettled in the manner therein mentioned. A ſettlement was accordingly made ſome time afterwards. The wife of Sir N. C. being dead, and he being in treaty

for another marriage, articles were entered into for a ſettlement upon the ſecond wife, and amongſt other things Sir N. C. covenanted to ſettle the copyhold lands upon her for a jointure, and a bill was afterwards brought by her and her truſtees, (the marriage having taken place), to compel a ſpecific performance of thoſe articles.

The argument on which the plaintiff's counſel relied, was, that the ſettlement on the ſon was purely voluntary, having been made long before any treaty of marriage had begun, and therefore fraudulent and void againſt a purchaſer for valuable conſideration, without notice (*b*), as the plain-

(*b*) The integrity of a purchaſer who claims againſt a voluntary ſettlement in a court of Equity, has before been conſidered; and it has been obſerved, that, though in ſuch caſes notice of the former voluntary conveyance would not prejudice the caſe of a purchaſer who claimed under an executed conveyance at law, yet that courts of Equity will not lend their diſcretionary aid to force the ſpecific execution of agreements to any but purchaſers for valuable conſideration and *without notice*; for theſe are univerſal teſts of integrity in thoſe courts, and where the conveyance is unexecuted, the purchaſer's caſe does not fall within the ſpecific remedy upon the ſtatute.

tiff,

tiff in that caſe was by her *marriage*. And the rather becauſe the agreement in writing comprized only the leaſehold eſtate, the copyhold eſtate having been ſettled long before, and at a time when there was no proſpect of the ſon's marrying. It was argued on the other ſide, that this ought not to be looked upon as a voluntary and fraudulent ſettlement as againſt the plaintiff, becauſe it was the chief inducement that prevailed with the friends of the ſon's wife, to conſent to the marriage, and to beſtow upon her the portion which ſhe brought with her; and that if they had *not* been aſſured that the copyhold was already ſettled upon the ſon, they would have inſiſted upon a ſettlement, or refuſed the portion. The Lord Chancellor decreed the ſurrender to the ſon to be good, declaring, that though it was at firſt voluntary, yet that, upon the treaty of marriage, it being regarded as the *principal inducement thereto*, it *became valuable*, and ought to be conſidered as if it were but *then* ſurrendered to the ſon. He added, that it was not neceſſary to inſert it in the articles, it being an eſtate of another nature, and to paſs in another

another manner; and being already ſettled, it was ſufficient in the articles, to provide for the ſettlement of what they *further* intended to ſecure on that marriage, without taking notice of what was *already* ſettled to their ſatisfaction.

In the caſe of *Eaſt India Company* v. *Clavel* (12), the decree of Lord Chancellor Harcourt was grounded on the ſame ſort of reaſoning. The caſe has been before ſtated for another purpoſe; but for the ſake of clearneſs it may be as well ſhortly to reſtate it here. A. agreed with the Eaſt India Company to go as preſident to Bengal, and entered into a bond of 2,000 *l.* penalty for performance of articles. But before he ſet out, he made a ſettlement of his eſtate, and, among other things, he declared the truſt of a term of 1000 years to be for raiſing 5,000 *l.* as a portion for his daughter, who afterwards married J. S. whoſe fortune was 700 *l. per annum*; J. S. was, before marriage, adviſed by counſel, that the portion was ſufficiently ſecured, and afterwards, on the death of his wife, had, in compliance with her requeſt, expended

(12) Prec. in Chan. 377.

expended 400 *l.* on her funeral. But no ſettlement had been made upon her by J. S. A. embezzled the goods and ſtock of the company to the value of 26,000 *l.* and, conſequently, had forfeited his articles and bond, and made himſelf liable to ſatisfy the company that ſum. They, accordingly, brought their bill againſt J. S. and the truſtees, to have an account of the real and perſonal eſtate of A. and praying that the ſame might, in the firſt place, be ſubjected to their demand. But it was urged, with ſucceſs, by the counſel for the defendant, that J. S. though he made no ſettlement, had a very good eſtate, of which his wife would have been dowable if ſhe had lived, and that he had expended 400 *l.* upon her funeral in compliance with her requeſt. That, *if this ſettlement were voluntary in its creation, yet, being the motive and inducement to J. S. to marry her, it had now become valuable*; of which opinion was the Lord Chancellor.

(13) Cowp. 705.

Doe v. *Routledge* (13) may, perhaps, not improperly be referred to this order of caſes, though it contained *other* circumſtances affecting

affecting the credit of the tranſaction on the part of the purchaſer. The voluntary ſurrender in that caſe was made in 1763, and the defendant under that ſurrender was notoriouſly entitled to the eſtate in remainder in 1767, when he paid his addreſſes to H. at which time a copy of the ſurrender was ſhewn by the defendant to the lady and her father, who *thereupon* gave their conſent to the marriage, which ſoon afterwards took place; the counſel for the defendant did not forget to inſiſt, that if the ſettlement was voluntary and void at the commencement, as againſt a ſubſequent purchaſer, it was made good in the ſequel by becoming the principal motive and inducement with the friends of the wife, to conſent to the marriage. The judgment of the court was for the defendant; but diſavowed for its baſis any technical conſtruction of the ſtatute, which it reſolved into a mere promulgation of the rules of the common law for the ſuppreſſion and avoidance of fraudulent conveyances. Whether this was doing juſtice to the purview of the ſtatute, or was too ſhallow a ſounding

ing of its depth and meaning, is for the ſtudent's enquiry, for the aſſiſtance of which he is referred to the preliminary obſervations with which this eſſay is introduced.

It was obſerved by the Chief Juſtice that the nephew *gained credit* by the *notoriety* of his title to the eſtate, the ſurrender to him being on the rolls of the court, and acceſſible to the whole country, and that the inducement of the lady's conſent, and that of her friends as a *conſequence* of that credit, had its weight on his judgment; but he added, that though what happened previouſly to the marriage (meaning, it may be ſuppoſed, the declarations of the nephew and his production of the documents to the intended wife and her father, while the marriage was in agitation) could not be coupled *with the firſt tranſaction* (*d*), becauſe the knowledge of it could not be brought home to William or Hugh Wat-

(*d*) It is conceived that this is the ſenſe of the paſſage.

ſon

ſon (*e*), yet that it ſerved to ſhew what in general may be ſuppoſed to happen from an act of that kind.

By this reaſoning his Lordſhip ſeemed to think, that where a marriage is ſubſequently induced by the viſible title of the voluntary alienee, it ingrafts no conſideration upon the original tranſaction, unleſs it appear, that it was an event in proſpect at the time of the voluntary conveyance; But the caſes above produced do not ſeem to turn upon a principle implicating any ſuppoſition of ſuch view in the grantor to a particular marriage for which the eſtate conveyed is to

(*e*) It is not clear how a knowledge of the tranſaction by Hugh Watſon, who was the pretended purchaſer, could have prejudiced his caſe, unleſs indeed, having at that time a promiſe of a conveyance from the uncle, he had himſelf ſtood by and perſuaded the lady or her friends to conſent to the match; and ſuch a conduct, (though a *ſubſequent* knowledge of the tranſaction, according to *Gooch*'s caſe, would not have diſqualified him under the ſtatute 27 Eliz.) would certainly have attached a direct fraud upon his caſe, ſo as to throw him out of the protection of the ſtatute.

become a proviſion; but rather rely upon the doctrine that a voluntary conveyance being good againſt all but creditors or ſubſequent purchaſers, and, where they are by way of advancement or proviſion for children, being good againſt *ſubſequent* creditors, and entitled to a favourable diſtinction both at law and in equity, are in a predicament to be confirmed and faſtened in the grantee, by becoming a prevalent motive with third perſons to conſent to a marriage, which is the moſt *valuable* and *weighty* of all *conſiderations*. It would indeed, in moſt caſes, be a violent ſtrain, to connect theſe conſiderations ariſing by matter *ex poſt facto* with the original reaſons of the firſt voluntary conveyance; but the truth ſeems to be, that, as the voluntary grantee has a *good eſtate* till it is impeached by a ſubſequent purchaſer from the original grantor, if, before ſuch ſubſequent purchaſer from the grantor appear, the voluntary grantee engages in a *bona fide* tranſaction with a third perſon, who either expreſsly purchaſes the eſtate by an actual ſettlement, or, by a marriage with the grantee induced by a juſt expectation of ſupport and

and preferment, acquires a general intereſt in the property, it ſeems that either the voluntary conveyance is confirmed as the medium of the new title, or the intereſt under it is fixed in the grantee by the acceſſion of a new meritorious claim. And this ſpecies of tranſaction ſeems to have been conſidered in *Prodgers* v. *Langham*, before referred to, as within the principle of the caſe there put by way of exemplification, *viz.* that if a man makes a feoffment by covin, and afterwards the feoffee makes a feoffment on valuable conſideration, and then the firſt feoffor enters and makes a feoffment for valuable conſideration; the feoffee of the feoffee ſhall hold the land againſt the feoffee of the firſt feoffor; for though the eſtate of the firſt feoffee was in its creation covinous and fraudulent, yet when he enfeoffs a third perſon upon valuable conſideration, ſuch feoffment ſhall be preferred to the feoffment ſubſequently made by the original feoffor.

This rule in *Prodgers* v. *Langham* was correſpondent to the deciſions of the courts upon the ſtatute of Marlebridge, 52 H. 3.

long before theſe ſtatutes of Elizabeth; according to which deciſions, if a father made a feoffment to his eldeſt ſon to defraud the king or other lord of his wardſhip, primer ſeiſin, or other fruits of the feudal tenure, the lord, in the language of the books, had a poſſibility to have the ward, if the father died leaving his heir within age; but if the feoffee made a feoffment over *bona fide*, and afterwards the father died, the ſon being within age, there that poſſibility was deſtroyed (13).

(13) 33 H. 6. *Andrew Woodcock's* caſe.

The authority of the above caſe of *Prodgers* v. *Langham*, covers, as it ſhould ſeem, the caſe of a ſubſequent marriage contracted by the voluntary grantee, where the ſubject of the voluntary conveyance is *expreſsly* a part of the marriage ſettlement, for then it is *ſpecifically* purchaſed by the valuable conſideration of matrimony. Its authority grows weaker as we recede from this point wherein the ſubject of the firſt conveyance is *expreſsly* within the *terms* of the ſubſequent contract, and as the evidence of expectation and inducement in third perſons whoſe intereſts are

ſupported by the marriage declines from poſitive aſſurance and agreement, to the mere general proſpect of eſtabliſhment founded upon appearances.

But although the efficacy of the valuable conſideration accruing by matter *ex poſt facto* is eſtabliſhed, upon clear authority, up to a certain extent, yet it has been always held that a tranſaction *good at the beginning*, cannot become *fraudulent* by matter *ex poſt facto* (14). The propoſition is true in a *general* ſenſe, but we muſt be careful to apply it only to thoſe caſes, where the tranſaction is not only good in *vulgar* apprehenſion, but is good upon the *true conſtruction* of the ſtatutes, for, as has been obſerved before, the policy of the ſtatutes has knit together in one frame and texture of fraud, tranſactions diſtant from each other in the order of time, and compounded an evidence out of both which ſuperſedes the neceſſity, in many caſes, of *direct proof* of proſpective contrivance. But as this particular point has been already diſcuſſed (15), little more need be ſaid reſpecting it in this place; the ſtudent will find that

(14) Vid. 2 Bulſt. 225.

(15) See preliminary obſervations.

the propoſition above noticed, is referible to thoſe caſes, where ſingle circumſtances not coupled in teſtimony with ſubſequent events by the ſtatute, are produced as the badges of fraud, and which yield at *once*, without any inceptive connection with future acts, all the teſtimony they import.

Such is the nature of the evidence of covin ariſing from *poſſeſſion* inconſiſtent with the expreſs and oſtenſible deſign of a conveyance, which has always been regarded as a ſtrong feature of fraudulent intent within theſe ſtatutes of Elizabeth. Accordingly, it has been determined (*f*), that if A. *bona fide*, and for valuable conſideration, mortgages his land, in which he has a term of years, to B. upon condition that if he repay the money to B. in a year afterwards, that he ſhall re-enter, and B. covenants with A. that he ſhall take the profits until that time, and A. does not pay the money, but B. hoping that A. will pay

(*f*) Vid. Shep. Touch. 65. *Lady Lambert's* caſe; and vid. the caſe of *Stone* v. *Grubham*, 2 Bulſt. 225. where the ſame reaſoning appears.

it

it at laſt, ſuffers him to continue in poſſeſſion, and take the profits of it for two or three years afterwards, and in the mean time judgment is obtained againſt A. upon his bond, and execution awarded; the leaſe ſhall not be ſubject to the execution, but the mortgage ſhall prevail againſt the creditor, for the poſſeſſion, being conſiſtent with the deed at the time of making it, and ſo not fraudulent, ſhall never be ſaid to be fraudulent by matter *ex poſt facto*. So in the caſe of *Griffin* v. *Stanhope* (16), where it was objected that the defendant had *concealed* the leaſe during her huſband's life, and that, therefore, it ought to be conſidered as fraudulent, becauſe, if ſhe had diſcovered it, perſons would have been warned from purchaſing; the Chief Juſtice anſwered that all actions have reference to their firſt original; that it would have been *better* if ſhe had diſcovered that ſhe had ſuch a leaſe, but the leaſe being good *at the firſt*, the ſubſequent concealment thereof ſhould not make it fraudulent.

(16) Cro. Jac. 455.

CHAPTER V.

SECTION I.

AFTER this general view of the legal conſequences of the *want of conſideration* in ſettlements and conveyances, the *vitiating effect* of *actual* fraud, whether it be chargeable as a bare matter of fact, as where it conſiſts in repreſentations of what is falſe or in ſuppreſſions of what *is true*, or ariſe as a concluſion of law upon facts, as where it is inferred from certain characteriſtic marks and indications, follows by a natural inference, ſince the law would otherwiſe be inconſiſtent with itſelf. The common law of England abhors every ſpecies of covin and colluſion; but being tender of *preſuming* fraud from *circumſtances*, ſtatutes have been ſpecially framed to ſuit the exigencies of the times (*a*), which are

(*a*) *Quæ naturâ videntur honeſta eſſe, temporibus ſunt inhoneſta*, Cic. de Off. lib. 3.

as

as fertile in the artifices of concealment as in the opportunities of deceit. It was the prevention and not the puniſhment of fraud in which the common law was defective, for there is no inſtrument or act which is not liable by the law of this country to be rendered abſolutely void by clear and explicit evidence of fraudulent intention. So general, indeed, is the condemnation of all fraudulent acts by the law of England, that a fraudulent eſtate is ſaid, in the maſculine language of the books, to be no eſtate in the judgment of the law. It forfeits the protection of every ſtatute which gives confirmation to doubtful titles, and while a diſſeiſor has the benefit of the ſtatutes of fines and limitations in ſupport of his wrongful title, a title acquired by covin is indefinitely open to be diſputed, and even acts, as well *judicial* as others, which of themſelves are juſt and lawful, if infected with fraud, are in judgment of law vitious and unavailing; for the maxim is *quod alias bonum et juſtum eſt, ſi per fraudem petatur, malum et injuſtum efficitur.* All the partialities of the law expire under its antipathy to fraud. If a woman has a right of dower, but

but recovers it againſt the tertenant by *covin*, the recovery is of no force; though dower is a favourite of the law (1). No remitter is produced, if eſtates come together by a fraudulent contrivance, and infants and feme coverts loſe their privileges wherever their acts are chargeable with colluſion (*b*).

(1) Co. Litt. 35. a.

The common law carried alſo its remedies againſt deceit, where poſitive proof could be obtained, to great perfection. It ſeems that Lord Hobart was of opinion, that if a truſtee ſold to a purchaſer for valuable conſideration without notice, an action would lie againſt him at the common law (*c*), and it has been ſaid, that many ſuits in Chancery might be ſaved by good pleading; for if a man had bargained and ſold his land at common law, and refuſed

(*b*) See the caſe of *Wimbiſh* v. *Tailboys*, Plowd. Com. 54. and *Fermor's* caſe, 3 Rep. 78. wherein abundance of examples of the ſame kind will be found: and ſee Dyer, fo. 294.

(*c*) Vid. Eq. Abr. 384. D. note a. ſed vid. 3 Atk. 312. the deſcription of a truſt by Lord Hardwicke, viz. where there is ſuch a confidence between the parties that no action at law will lie,

to

to make aſſurances accordingly, and afterwards conveyed the lands to another who had notice of the firſt bargain, the firſt bargainee might have had an action upon the caſe for the deceit as well as a ſubpœna (2). It is a rule, at leaſt, as old as the year-book 9 H. 6 53. that if a man ſell any commodity warranting it to be good, an action on the caſe lies againſt him. And it has been ſubſequently ſettled (3), that poſſeſſion is a warranty that the goods belong to the ſeller, for poſſeſſion is a colour of title, and an action lies upon the bare affirmation of the poſſeſſor that the goods are his own. That the goods are of a merchantable quality is alſo a warranty which the law implies (4). In a late caſe (5) it was determined by three of the judges of B. R. that to ground the remedy at law by action upon the caſe, it is not neceſſary that the defendant ſhould be a gainer by the deceit, or that he ſhould collude with the perſon who is a gainer. And by that caſe the broad poſition in Comyns (6), that "an action upon the caſe lies for a deceit when a man does any deceit to the damage of another;" and the opinion of Croke, J. in

(2) Vid. Hob. 267. cites the opinion of Fairfax J. 21 Ed. 4. 23.

(3) Lord Raym. 593.

(4) Gilb. Evidence, 187.

(5) 3 T. R. 51.

(6) Com. Dig. tit. act. upon the caſe for a deceit. A. 1.

(7) 3 Bulſt. 95.

in *Bayley* v. *Morrell* (7), that "fraud without damage, or damage without fraud, gives no cauſe of action; but where theſe two do occur, there an action lieth," ſeem to have received an authoritative confirmation.

But a great difference has always been taken between the allegation of a thing as having actually happened, and as having been likely or probable to happen, for there are ſome modes of ſtating things that import higher degrees of aſſurance than others. As where a man poſſeſſed of a term of years, being about to ſell it to A. declares that a third perſon would have given him *ſo much* for it, though in truth ſo much was never offered, no action upon the caſe will lie for *ſuch* deceit; for this is a remote ground of eſtimation with which no prudent perſon ought to be ſatisfied. But if a man, treating for the ſale of a houſe, aſſure the intended purchaſer, that the rent was 30 *l.* per annum, whereas in truth the rent was 20 *l.* only, an action lies for *this* deceit: for here is an averment of a *fact*, and of a fact that furniſhes a criterion of the real

real value of the premiſ ...oſe
an actionable deceit at l
no harm to a man himſe
the innocent cauſe of h
ſo as to render him liable
if without making him
cauſe of injury, I ſo cc
myſelf, as to make the puniſhment fall
upon an innocent third perſon; as, if I
chaſe the cattle of A. into the land of J. S.
ſo as to ſubject A. to the action of J. S. I
render myſelf liable to the action of A. for
this deceit (9). And it has been ruled,
that if A. perſuade B. to do a thing lawful
in itſelf, but injurious to C. and with the
ſpecial view of injuring C. an action will
lie for the fraud and combination (10).
And it is ever a great aggravation of the
offence to make uſe of legal proceſs, in the
accompliſhment of a fraudulent purpoſe,
as if a man, intending to ſteal a horſe,
take out a replevin, and thereby obtain a
delivery of the horſe from the ſheriff (11).

526

(9) Vid. *Tiſſyn* v. *Wingfield*, Cro. Car. 325. Roll. Abr. 100. 101. Allen, 3.

(10) Carth. 3, 4.

(11) Vid. 2 Inſtitutes, 108.

SECTION II.

SOME of the moſt ſtriking examples have been ſelected to point out to the ſtudent, the ſtrong antipathy of the common law to all manner of fraud and deceit, which in the more flagrant inſtances are the ſubject of *criminal*, as well as *civil* proſecution. But although the cognizance of every kind of fraud as much belongs to the common law, as to courts of Equity, yet the ſpirit of reluctance in our legal maxims to *preſume* fraud from the *circumſtances* and *condition* of parties, and the inſufficiency of *legal* remedies for the purpoſes of *diſcovery* in caſes of latent and complicated contrivance, has occaſioned ſuch ſubjects to be principally agitated in courts of Equity, having been always a natural branch of its original juriſdiction (*a*). But as it belongs to a more general treatiſe on

(*a*) Vid. 2 P. Wms. 154. 157. 220.

the

the ſubject of frauds, (our preſent purpoſe being *principally* to illuſtrate the rules to which conveyances muſt conform in order to be available within the ſtatutes againſt fraudulent conveyances), to diſplay *at large* the practice and principles of the different courts, in the application of their reſpective remedies to the various artifices of fraud, the curioſity of the reader can expect to be gratified *here*, with only ſuch a curſory view of the general and conſtitutional extent of the relief at law and in equity, againſt covinous and colluſive practices, as may aid his conceptions of the conſtructive *ſupplemental* efficacy of thoſe ſtatutes, which are the *principal* concern of this eſſay. This object, however, will perhaps, excuſe a few particular obſervations, on the acceſſory relief furniſhed by courts of Equity, towards the developement and ſubverſion of fraud. It has been obſerved by the author of the Commentaries (1), that the concurrent cognizance of fraud is one of thoſe branches of equitable juriſdiction, which ariſe from the authority inherent in courts of Equity of compelling a diſcovery upon the oath of the party: and "that in various kinds of frauds they aſſume

(1) 3 Bl. Com. 437. 439.

aſſume a concurrent juriſdiction, not only for the ſake of a diſcovery, but of a more *extenſive* and *ſpecific* relief, as by ſetting aſide fraudulent deeds, decreeing reconveyances, or directing an abſolute conveyance merely to ſtand as a ſecurity."

This more extenſive relief is inſtanced moſt prominently in the admiſſion of ſtrong circumſtances as a ground to preſume fraud in this court; whereas by the ſtrictneſs of the common law, fraud muſt be *proved*, and can never be *preſumed*. As a conſequence of which greater latitude in the collecting and eſtabliſhing of fraud, a man may in a court of Equity be guilty of a ſpecies of *negative* fraud, by his *ſilence* on an occaſion where *ſilence ſpeaks*; as where he ſtands by and ſees another proceed in a tranſaction under an erroneous impreſſion of facts, which he is able and bound in conſcience to remove. Such a conduct operates as a kind of equitable eſtoppel (*b*), whereby the party guilty of it,

(*b*) The eſtoppel at common law aimed at the *prevention* of fraud which delights in duplicity and inconſiſtency of conduct.

it, having been *ſilent*, when he ought in conſcience to have *ſpoken*, is debarred from *ſpeaking* where conſcience requires him to be *ſilent*. As in the caſe of *Raw* v. *Potts* (2) affirmed in the Houſe of Lords, where, A being tenant in tail remainder to B. in tail, A., not knowing of the remainder over, made a ſettlement upon his wife for her life by way of jointure, which B. who knew of the entail, *engroſſed*, and after the death of A. recovered at law againſt the widow by ejectment, the widow was relieved in Chancery by perpetual injunction. Where a man, by his repreſentation, makes a partial diſcloſure of facts, and by mutilated and ſmothered ſtatements induces and perſuades another to do that which muſt notoriouſly be prejudicial to him, there ſeems to be but little doubt, but that ſuch conduct is a ground for the action upon the caſe at law; but the party

(2) Prec. in Chan. 35.

---

conduct. See a notable inſtance in *Vernon*'s caſe, 4 Rep. 46. and ſee the caſe of *Slade* v. *Drake*, Hob. 297. and the book 2 R. 3. fo. 19. But this *ſtrict legal* eſtoppel worked within a narrow compaſs, being tied down to many rules and formalities, vid. Co. Litt. 352. a.

in the caſe laſt above cited was not called upon, except by his conſcience, for a diſcloſure of that which he concealed, nor was his non-diſcloſure coupled with any repreſentations, that formed the inducement in the mind of the perſon, acting under the miſtake. So, in a ſimilar caſe (3), where a mother, who was abſolute owner of a term, (the ſame being limited to her in tail,) having been preſent at a treaty for her ſon's marriage, and having heard him declare, that the term was to come to him at his mother's death, had atteſted the deed whereby the reverſion of the term was ſettled on the iſſue of the marriage, after her death, ſhe was compelled in equity to make good the ſettlement. And the rule is *general*, that to take advantage of a miſtake, which a man has the means and opportunity of ſetting right, is a fraud in *equity*. Thus in *Mead* v. *Webb* (4) where a leaſe was repreſented by the leſſor's agent to be more valuable than it really was, and the leſſor ſtood by and heard the miſrepreſentation without contradicting it, for this reaſon the leaſe was ſet aſide. The caſes

(3) 2 Vern. 150 Hunſden v. Cheney.

(4) Bro. P. C. 497.

of *Hanning* v. *Ferrers* (5), *Hobbs* v. *Norton* (6), and *Barrett* v. *Wells* (7), are remarkable examples of a ſimilar kind of relief (8). For other inſtances of the more extenſive and ſpecific remedy afforded in the court of Chancery in matters of fraud, the reader may be referred to the ſeveral heads of juriſdiction and relief in the books, under their reſpective titles of *underhand agreements in derogation of matrimonial contracts* (9). *Marriage brokage bonds* (10). *Feigned conveyances, and promiſes to induce marriage* (11). *Fraudulent repreſentations for the ſame purpoſe* (12). *Securities obtained upon pretence of demands that are fictitious* (13). *Advantages taken of the weakneſs of others* (13). *Advantages taken of anothers diſtreſs* (14). *Inequality and influence ariſing from the relationſhip of parties* (15). The admirable ſummary of the different relievable heads of fraud in courts of equity, exhibited by Lord Hardwicke in pronouncing his decree in the caſe of *Cheſterfield and others* v. *Janſſen* (16), may

(5) Eq. Abr. 357.
(6) 1 Vern. 136.
(7) Prec. in Chan. 131.
(8) And ſee 2 Vern. 370. 554. 726.

(9) Vid. *Peyton* v. *Bladwell*, 1 Vern. 240. *Morriſon* v. *Arbuthnot*, 1 Bro. Chan. Rep. 548, note; and *Pitcairne* v. *Ogbourne*, 2 Vez. 375.
(10) 1 Chan. Rep. 87. Show. P. C. 76. *Hall* v. *Patter*.
(11) 1 Bro. P. C. 88. *Webber* v. *Farmer*.
(12) 1 Bro. C. R. 543. *Neville* v. *Wilkinſon*.

(13) 2 Ch. Ca. 103. 2 P. Wms. 203. 2 Atk. 324. 4 Bro. P. C. 557. 2 Vez. 627. 7 Bro. P. C. 70. 2 Bro. C. R. 167.
(14) Ca. temp. Talb. 38. 3 Wooddeſon, Lect. 457.
(15) 1 P. Wms. 118. Ca. temp. Talb. 111. 1 Vez. 381. 2 Vez. 259. 547. 2 Atk. 25. 258. 1 Bro. C. R. 125. 558. 2 Bro. C. R. 404. 3 Bro. C. R. 156. 4 Bro C. R. 117.
(16) 2 Vez. 155.

perhaps be thought an uſeful appendix to this ſection.

(*c*) " 1ſt, Said his Lordſhip, fraud, which is *dolus malus*, may be *actual*, ariſing from facts

(*c*) The Reader will, perhaps, pardon the following conciſe view of the caſe: John Spencer in 1738, having contracted a debt, principally to tradeſmen, of 20,000 *l.* which he was deſirous of paying off, and having a well-grounded expectation of a conſiderable increaſe of fortune, at the death of his grandmother, the dutcheſs of Marlborough, was reſolved to raiſe a ſum of money upon this expectancy: he was a little above thirty, but impaired in his conſtitution by intemperance; the dutcheſs was ſeventy-eight, and healthy for her time of life. His propoſal, which was ſent to market, was to borrow the ſum of 5000 *l.*, in conſideration of which Mr. Spencer offered to enter into a ſecurity to pay the lender 10,000 *l.* at the death of the dutcheſs of Marlborough in caſe Mr. Spencer ſhould ſurvive her, but no payment at all was to be made if *ſhe* ſhould ſurvive Mr. Spencer. The defendant, after ſome heſitation, accepted the propoſed terms: and accordingly in May 1738, paid to Mr. Spencer the 5000 *l.* who thereupon executed to the defendant a bond in the penalty of 20,000 *l.* conditioned for the payment of 10,000 *l.* to the defendant on the death of the dutcheſs, in caſe Mr. Spencer ſhould ſurvive her, but not otherwiſe. The dutcheſs of Marlborough died in October 1744, and in two or three months afterwards on the defendant's delivering to Mr. Spencer the ſaid bond to be cancelled, he executed a freſh bond, whereby he became

facts and circumſtances of impoſition; which is the plaineſt caſe. 2. It may be apparent

became bound to the defendant in the penalty of 20,000*l.* for the payment of 10,000 *l.* with lawful intereſt, on the 19th of April then next, and executed alſo a warrant of attorney to empower a judgment to be recorded againſt him at the defendant's ſuit for the ſaid 20,000 *l.* on the ſaid bond, which judgment was afterwards entered up in Mr. Spencer's lifetime. Mr. Spencer in 1745, at different times paid two ſeveral ſums of 1000 *l.* each, in part of his debt, and frequently declared that he was ſatisfied with the defendant's conduct, and alſo that it was his intention to pay his whole demand as ſoon as poſſible. The defendant after his death ſued out a *ſcire facias* to have execution againſt the executors upon the judgment entered up againſt the teſtator. The executors applied to the court of chancery for an injunction, and to be relieved on payment of the 5,000 *l.* with intereſt from the time of advancing it.

Three points were made at the bar on the plaintiff's ſide, videlicet, 1. That the original contract was *uſurious* within the ſtatutes, as being for a greater premium than the law allowed, and if ſo both the new and the old ſecurity would fall to the ground. 2. That if it was not uſurious, it was an *unconſcionable bargain*, and an unreaſonable advantage had been taken of the wants of a neceſſitous perſon, and ſuch as that court would relieve againſt. 3. That if the court was warranted to relieve againſt the firſt ſecurity, the new ſecurity would be conſidered as a continuance of the firſt oppreſſion, and conſequently ſtand in an equally unfavourable light in that court.

The Chancellor and Judges were unanimous in opinion. And, firſt, they were clear that the contract

apparent from the intrinſic nature and ſubject of the bargain itſelf, ſuch as no man

---

in queſtion was not within the ſtatutes of uſury. The ſecond point they all thought was not neceſſary to be decided, becauſe they held the plaintiff's counſel to be clearly wrong in the third; for they were unanimous in thinking that whether the bargain was or was not originally ſuch as the court would relieve againſt as unconſcionable, the *renewal* and *recognition* of it by Mr. Spencer, in the circumſtances in which he ſtood at the time of the ſecond ſecurity given, was a complete confirmation of the contract, and removed all ground for the interference of the court *. The difficulty of deciding what bargains for expectances are *to be deemed* unconſcionable, was felt by the whole court; and they were glad to be relieved from the neceſſity of determining the caſe on that point. The ſum of their obſervations, however, on that ſubject ſeemed to be, that no inflexible rule can govern the queſtion, but that the equity of each caſe muſt ariſe out of its *particular* circumſtances. To ſay that in no caſe a man ſhall, under preſent preſſure, ſell his expectancy, would often be to deprive the diſtreſſed of a reaſonable reſource that might ſave them from worſe expedients; and to refuſe a reaſonable advantage to the lender, would be equivalent to an univerſal prohibition of ſuch contracts †. Parents

* An advantage may perhaps be thought to ariſe from keeping the rule in ſome uncertainty, as it may be better for the morals of the community, that a ſort of legal peril be perpetually overawing theſe tranſactions.

† In Gilb. Ch. Caſes, 291, 2. it is ſaid that where the father withholds ſubſiſtence from the ſon, whereby he is induced to enter into ſuch a contract, equity will not relieve againſt it.

and

man in his ſenſes, and not under deluſion, would make on the one hand, and ſuch as no

and relations are ſometimes penurious to their children and expectants, who, (to uſe the expreſſion of Judge Burnett,) if hindered, ſometimes, from ſupporting themſelves by raiſing money upon their expectancies, *might ſtarve in the deſart within view of the land of Canaan.* On the other hand the conſequences are to be dreaded of lending the *countenance* of the court to ſuch tranſactions. It will *rarely* happen that ſuch contracts are unaccompanied with miſchievous intentions. They for the moſt part adminiſter to profligacy on the one ſide, and to avarice on the other; and where want and covetouſneſs bring a borrower and lender together, it is very unlikely that purity and equality ſhould reign in their bargains. Such contracts tend to a deluſion in what is of general concern—the proviſion for poſterity. Such anticipating haſte diſturbs the moral order of things, by forcing into preſent exiſtence what would otherwiſe have awaited the diſcretion of maturer years; and thus the borrower is deceived, and ſociety injured. The parent or perſon on whoſe life the expectancy hangs, is alſo groſsly deluded in being made to become the benefactor of a deſigning money-lender, where he meant to beſtow importance and comfort on his poſterity. The attention of the court of Chancery has been always directed with anxiety to this evil; and though at firſt its interference was attracted by the *actual fraud*, which is common in ſuch contracts, it extended its remedy with the extenſion of the miſchief, and gave relief in caſes where the contract carried in itſelf

no honeſt and fair man would accept on the other; which are unequitable and unconſcionable

---

itſelf ſtrong ‡ *intrinſic evidence only* of impoſition, ſuch as a groſs inequality in the bargain, making it ſuch as one man could not drive with another who had his eyes open and his ſenſes clear, or who was not in ſuch a neceſſitous predicament as to be incapable of reſiſting impoſition and oppreſſion. But the caſe of an heir of a family, with nothing but the hope of ſucceſſion, dealing for his expectancy, is always excepted out of the ordinary caſes; and as ſuch contracts are pernicious in their principle, courts of equity have great alacrity in ſetting them aſide if there is any thing at all unconſcionable in the tranſaction §. The courts alſo take a difference *between* a remainder-man in expectancy upon his *father*'s ‖ life and living under his *father's protection*, and a remainder-man in expectancy upon the death of a *ſtranger*; eſpecially if the ſon have other expectancies which render him dependent upon his father.

There is a right ſpirit in nature which all wiſe ſyſtems of poſitive laws muſt, under certain modifications, adopt,

‡ Per Lord Thurlow in *Gwynne* v. *Heaton*, 1 Bro. Ch. Rep. 6. an *inadequate* conſideration is not *alone* ſufficient to vitiate the contract, although in order to do ſo, the conſideration *muſt* be *inadequate*. Where property is ſold for a ſum groſsly inadequate, the court has never ſuffered it to ſtand. His Lordſhip afterwards obſerved, that to ſet aſide a conveyance, there muſt be an inequality *ſo* ſtrong, groſs, and manifeſt, that it muſt be impoſſible to ſtate it to a man of common ſenſe, without producing an exclamation at the inequality of it.

§ Lord Thurlow in the above caſe of *Gwynne* v. *Heaton*, denied that the heir's having no proviſion from his father, made any difference.

‖ See the caſe of *Twiſleton* and *Griffith*, 1 P. Wms. 310.

to

conſcionable bargains; and of ſuch even the *common law* has taken notice. 3. A third

---

to be ſafe and durable. The eldeſt of all laws is the rule of filial ſubmiſſion; it is a law of the heart, which gave the firſt notions of organized government, and muſt be reſpected and followed in every ſound ſyſtem of juriſprudence. Regard to this primæval policy dictates the diſcouragement of all clandeſtine bargains with heirs to the deluſion of the anceſtor, who is thereby made to act upon a blind conſideration for the benefit of thoſe who have furtively obtruded themſelves into the channel of his bounty, and the inexperienced are taught to conceal their circumſtances from thoſe who have a moral right to a diſcloſure, and whoſe timely admonitions and reproofs might ſave them from deſtruction. There are, beſides, reaſons of policy for the legal diſcountenance of theſe clandeſtine bargains with young expectants, drawn from the expediency of preventing the beggary of opulent and noble families, which are one ſupport of the ſtate; and though courts of equity are not on mere political reaſons to ſet aſide contracts, or to aſſume the office of the legiſlature, yet where there is a colour on conſcientious grounds for their interference, they will blend with their motives conſiderations of public utility; for though they cannot *make* laws, they will take the *ſpirit of the laws for their guide*, in repelling the ſocial miſchiefs which reſult from individual profligacy or avarice. Moſt of the acts of parliament which have been made for the ſuppreſſion of theſe unconſcientious dealings between men, do not import any want of power in courts of equity to give relief, but by making ſuch proceedings void in law give a ſhort remedy againſt them.

kind

kind of fraud is that which may be *presumed from the circumstances and condition of the parties contracting*; and this goes further than the *rule of law*, which is that it must be *proved* and not *presumed*. 4. A fourth kind of fraud is collected or inferred, in the consideration of a court of Equity, from the nature and circumstances of the transaction, as being an imposition or deceit practised on third persons not parties to the fraudulent agreement—of this kind are marriage brokage contracts; which, though neither of the parties be deceived therein, *tend* necessarily to the deceit of parents and friends; so in clandestine private agreements to return part of the portion of the wife, or of the provision stipulated for the husband, to the parent or guardian; in most of these cases the thing is transacted by the parties with their eyes open; but if there be fraud therein, this court holds the case infected thereby, and relieves. So where (*d*) a debtor enters into a deed of composition

(*d*) Such cases of deceit are also remediable at law; see 2 T. R. 763. *Cockshot* v. *Bennett*, and see 3 T. R. 551.

with

with his creditors for 10*s.* in the pound, on condition that all other creditors executed within a certain period; if the debtor privately agrees with one creditor, to induce him to ſign this deed, that he will pay or ſecure to him a greater ſum in reſpect of his particular debt, in this there can be no particular deceit on the debtor who is party thereto, but it tends to the deceit of the other creditors, who relied on an equal compoſition, and conſented out of compaſſion to the debtor. So, if premiums be contracted to be given for preferring or recommending to a public office or employment, none of the parties are defrauded, but the perſons having the legal appointment to theſe offices are or may be deceived thereby; or, if the perſon agreeing to take the premium have authority to appoint the officer, it tends to public miſchief by introducing an unworthy object for an unworthy conſideration. Theſe caſes ſhew what courts of Equity mean when they profeſs to go on reaſons drawn from public utility. To weaken the force of ſuch reaſons they have been called political arguments, and ſaid to be

an

an attempt at introducing politics into the deciſions of courts of juſtice. But this is far from the true light in which it ought to be conſidered; for if the word *politics* be taken not in its *common acceptation*, but in its true *original* meaning, it comprehends every thing that concerns the government of the country, of which the adminiſtration of juſtice is a conſiderable part. And thus far, and in this ſenſe is relief in a court of Equity founded on public utility. Particular perſons in their contracts ſhall not only tranſact *bonâ fide* among themſelves, but ſhall not tranſact *malâ fide* in reſpect of *other* perſons who ſtand in ſuch a relation as either to be affected by the contract, or by the conſequences of it; and as the reſt of mankind, beſide the parties contracting, are concerned, the caſe is properly ſaid to be governed by public utility. 5. The laſt head of fraud, on which relief has been given, is that which infects catching bargains with heirs, reverſioners, or expectants, in the life of the father, &c. againſt which relief has always been extended. Theſe have been generally *mixed* caſes,

caſes, compounded of all or ſeveral ſpecies of fraud. Fraud, too, may be *preſumed* or *inferred* from the circumſtances or condition of the parties contracting; as from weakneſs on the one ſide, uſury on the other; or extortion, or advantage taken of infirmity. And an appearance of fraud may ariſe from the nature of the bargain. In moſt of theſe caſes have concurred deceit and illuſion on other perſons not *privy* to the fraudulent agreement. The father, anceſtor, or relation, from whom the eſtate has been expected, has been kept in the dark. The heir or expectant has been prevented from diſcloſing his circumſtances, and reſorting for advice to thoſe who might have given them at the ſame time relief and inſtruction; the anceſtor is miſlead, who has been induced thereby to leave his eſtate, not to his heir or family, but to a ſet of artful perſons, who have divided the ſpoil *before-hand.*"

SECTION III.

THE principle of expounding beneficially and equitably all ſtatutes againſt fraud is agreeable to thoſe ſtrong maxims of reſiſtance to all ſhapes of covin and deceit manifeſted by our legal and equitable juriſdictions. Notwithſtanding theſe laws are greatly penal, the rule ſtill holds of giving them an extended and liberal expoſition (*a*). *In biis enim quæ ſunt favo-*

(*a*) Statutes made in ſuppreſſion of deceit and covin ſhall be equitably expounded, although they are greatly penal. Plowd. Comm. *Wimbiſh* v. *Tailboys*, 59. and ſee 1 Rep. 131.

The ſtat. 1 H. 7. c. 1. which gives a formedon in remainder againſt the pernor of the profits was made in ſuppreſſion of covin (for a feoffment made to perſons unknown to defraud thoſe who had right to the land was a great covin and deceit in our law) ſhall be equitably expounded. Plowd. 59.

And the ſtat. of Marlbridge ſpeaks of thoſe "who uſed to enfeoff their eldeſt ſons and heirs being within age;" yet if a man's *firſt* ſon be dead, and he enfeoff his *ſecond* ſon, who is his heir, it is within the equity of

favorabilia animæ, quamvis ſunt damnoſa rebus, fiat aliquando extenſio ſtatuti.

The

---

of the ſtatute; or if he levy a *fine* to him, which is matter of record, this ſhall be within the equity of the ſtatute, though it ſpeaks only of a *feoffment*. Id. ibid.

So the ſtatute 32 H. 8. c. 9. ſhall be extended by equity, being enacted for the ſuppreſſion of fraud in buying pretended titles; and *leaſes for years* as well as *higher eſtates*, ſhall be intended by it. Plowd. 78. *Partridge* v. *Strange* and *Croker*.

So the ſtat. 31 El. c. 6. to prevent ſimony is to be *largely* expounded though *penal*. Hob. 75. *The King* v. *Biſhop of Norwich*.

Statutes in ſuppreſſion of fraud bind the king; as in the caſe of *Magdalen Coll.* 11 Rep. 73. if one intending to ſell his land had by fraud conveyed it by deed enrolled to the king, in order to deceive a purchaſer, and he afterwards ſold the land for a *valuable conſideration*, and makes a conveyance accordingly, in this caſe the purchaſer ſhall enjoy the land againſt the king by virtue of the ſtat. 27 El. c. 4. for the act being general, and made for ſuppreſſing fraud, ſhall bind the king.

The ſtatute 11 H. 8. c. 5. being made to ſuppreſs fraud and deceit, ſhall be expounded *beneficially*; and therefore whereas the words of that ſtatute are that "where tenant for life or years has demiſed or granted to the intent that thoſe in reverſion (viz. their leſſors, their heirs, and aſſigns), ſhould not know their names, and afterwards the firſt tenants continually occupy the lands, &c. and make waſte, it is ordained,

&c.

The ſtatutes 13 and 27 Eliz. were conceived in very general language to give room for theſe maxims to govern their conſtruction and point their application; and as a preventive operation was thought to be moſt agreeable to their true intention, *that* being the beſt mode of dealing with the deliteſcency of the ſubject, theſe ſtatutes were conſtrued as calling for a more jealous ſcrutiny into circumſtances indicating duplicity and illuſion, and a more *conſtructive* collection

---

&c. that he in reverſion (in ſuch caſe) ſhall maintain a writ of waſte againſt the tenant for life or years;" yet *every aſſignee* of the firſt leſſee *mediate* or *immediate* is within the ſaid act, although *not therein mentioned*; alſo *he in remainder* is within the act, as well as he *in reverſion*, although both in the preamble and body of the act there is mention made only of him in *reverſion*. *Booth*'s caſe, 5 Rep. 77. a.

5 & 6 Ed. 6. c. 16. Sale of offices. This ſtatute being againſt fraud is conſtrued as a *remedial* rather than a *penal* law. Vid. *Law* v. *Law*, 3 P. Wms. 391.

Many other examples of the ſame kind may be ſeen in Plowden's Commentaries, p. 59. *Wimbiſh* v. *Tailboys*, 1 Rep. 131. a. 3 Rep. 78. *Fermor*'s caſe, 5 Rep. 80. *Fitzherbert*'s caſe.

of the *evidences* of fraudulent deſign than had before been adopted. Ten years after the paſſing of the ſtatute 13 Eliz. c. 5. the great caſe, called *Twyne's* caſe, in the Reports, was determined, which, as it is ſhort, it may be as well to introduce a ſecond time in this place. P. was indebted to T. in 400*l.* and was indebted alſo to C. in 200 *l.* C. brought an action of debt againſt P. and *pending the writ* P., being poſſeſſed of goods and chattels of the value of 300 *l.* *ſecretly* made a *general* deed of gift of *all* his goods and chattels, real and perſonal whatſoever, to T. in ſatisfaction of his debt; notwithſtanding which P. *continued in poſſeſſion of the goods*, ſome of which he ſold again, ſhore the ſheep, and marked them with his own mark. Afterwards C. had judgment againſt P. and took out a *fieri facias* directed to the ſheriff of Southampton, who, by force of the ſaid writ, came to levy the ſaid goods. Divers perſons, by the command of T. reſiſted the ſheriff by force, claiming the goods as the goods of T. by virtue of the ſaid gift; and whether the gift, on the whole matter, was a good gift, or fraudulent

and void within the 13 Eliz. c. 5. was the queſtion. It was determined by the Lord Keeper of the Great Seal, by the Chief Juſtices, and by the whole court of Star Chamber, that the gift was fraudulent within the ſtatute. And as the ſigns and marks of fraud it was ſaid by the court,

1. That the gift was general, without exception of the donor's apparel, or of any thing of neceſſity.

2. The donor continued in poſſeſſion, and uſed the goods as his own; and by means thereof traded with others, and defrauded and deceived them.

3. It was made in ſecret.

4. It was made pending the writ.

5. There was a truſt between the parties; for the donor poſſeſſed all, and uſed them as his proper goods; and fraud is always appareiled and clad with a truſt.

6. The

6. The deed expreſſes that the gift was made honeſtly, truly, and *bonâ fide, et clauſula inconſueta ſemper inducunt ſuſpicionem.*

We are to obſerve, that there was a perfectly good oſtenſible conſideration for the gift, and that the whole objection reſted on the proofs of *mala fides* (*b*), and therefore Lord Coke gives the following advice grounded on the reſolution of this caſe: "When any gift ſhall be made to you in ſatisfaction of a debt, by one who is indebted to others alſo: 1. Let it be made in a public manner, and before the neighbours, and not in private, for ſecreſy is a mark

(*b*) In *Wilſon* v. *Wormal*, Godb. 161. it was ſaid to be law, that if a man, having goods of the value of 30 *l.* be indebted to two men, viz. to one in 20 *l.* and in 10 *l.* to another; and the debtor aſſigns to him, whoſe debt is 10 *l.* all his goods, to the intent that for the reſidue above the 10 *l.* he ſhall be favourable to him; this aſſignment is *altogether* void, becauſe it is fraudulent in *part*. But Foſter J. ſaid, that it ſhould only be void for the ſurplus. It ſeems clear, however, that, if the donor had owed 10 *l.* more to a third creditor, or the whole 30 *l.* to the diſappointed creditor in the above caſe, the donee, as implicated in the fraud, could have retained nothing.

of fraud. 2. Let the goods and chattels be appraiſed by good people to the very value, and take a gift in particular (*c*) in ſatisfaction of your debt. 3. Preſently after the gift, take poſſeſſion of the goods, for continuance of poſſeſſion in the donor is a ſign of truſt."

The general concluſion from this caſe of *Twyne* is, that evidence of the fraudulent intent ſuperſedes the whole enquiry into the conſideration, for no merit in any of the parties to a tranſaction can ſave it if it carries intrinſically *or extrinſically* the plain characters of fraud. And one of the plaineſt of theſe characters of fraud is the poſſeſſion of the party contradicting the viſible purport of an abſolute conveyance; which inconſiſtent retention of the thing pretended to be tranſferred is very much aggravated as an evidence of fraud, if the poſſeſſion is accompanied by acts of ownerſhip, for this plainly denotes a ſecret ſeparation of the legal and beneficial property. The natural conſequences of this contradictory poſſeſ-

(*c*) *i. e.* expreſsly.

ſion

ſion involve a two-fold injury. The beneficial intereſt in the goods ſo circumſtanced belong either to the aſſignor or aſſignee; if they belong to the aſſignor, he might be enabled by his meek transfer, if it could prevail, to continue to himſelf the enjoyment of *that* which in conſcience belongs to his creditors; if they really belong to the donee or aſſignee, the poſſeſſor might be enabled to attract to himſelf an illuſory credit, againſt which ordinary prudence is an inſufficient guard. But the degree of public inconvenience produced by this ſeparation of the property from the poſſeſſion depends greatly upon the nature of the thing the property in which is transferred. The property of ſome things is not wholly aſcertained by the poſſeſſion; and the nature and condition of other things may preclude the poſſibility of a ſpecific transfer at the moment of the ſale.

Thus where *land* is conveyed, the want of poſſeſſion caſts a leſs degree of ſuſpicion upon the tranſaction, than where *goods* are the ſubject of the conveyance, for with reſpect to land, the property is

evidenced by the poſſeſſion of the title deeds, and manual occupation is no criterion of ownerſhip. But in looking for the real owner of *moveable chattels* we attend to the circumſtance of poſſeſſion; ſince they are not only *capable* of ſpecific delivery, but are ordinarily *uſed* and *enjoyed* by being *poſſeſſed*. Land is enjoyed and poſſeſſed by title; and fraud in the transfer of it, is mainly to be inferred from the inconſiſtency of the title with the poſſeſſion of the title deeds. Fixtures to the freehold follow the land, and are ſecured in intereſt to the leſſee or aſſignee by the muniments of his title (1).

(1) Vide *Poole's* caſe, Salk. 368.

The property of a warehouſe may paſs by a ſymbolical delivery: the delivery of the keys, which open it, is conſtrued to be a delivery of the goods contained within it (2).

(2) 1 Atk. 170.

So, with reſpect to ſhips at ſea, if an aſſignment be made, and the charter-party, invoice, &c. be delivered, all means are uſed to transfer the thing, which the circumſtances of the caſe permit (3).

(3) *Brown* v. *Heathcote*, 160. *Atkinſon* v. *Malling*, 2 T. R. 462.

Thus

Thus in *Jacobs* v. *Shepherd* (4), where an aſſignment of goods which were actually at the time of the aſſignment beyond ſea, had been ſet aſide by Sir J. Jekyl at the rolls, as falling within the bankrupt laws the borrower being in failing circumſtances, the decree was reverſed by Lord Chancellor King upon an appeal (5).

(4) 1 Burr. 478.

(5) Vid. *Lempriere* v. *Paſley*, 2 T. R. 485. et vid. *Falkner* v. *Caſe*, 1 Bro. C. R. 125. 2 T. R. 491.

And, in general, with reſpect to this order of caſes, we may remark, that the want of an immediate transfer of the poſſeſſion is no direct badge of fraud within the ſtat. 13 El. c. 5. or any title to the commiſſioners under the ſtatute 21 Jac. c. 19. of bankrupts.

But in conveyances of land we may obſerve, that there is ſome difference of conſtruction under the ſtat. 13 El. c. 5. and the ſtat. 21 Jac. c. 19. ariſing from the diverſity in the objects of thoſe ſtatutes. The former being principally framed to prevent a preſent fraud upon the crediditors, whoſe legal remedies are attempted to be defeated, while the debtors enjoy the property out of which their debts ought to be ſatisfied, the latter having

chiefly in view not ſo much the prevention of *actual* fraud as the diſappointment of thoſe ſecret engagements by which a deluſive credit *may* be obtained to the injury of the fair trader, and by which ſecret priorities are endeavoured to be eſtabliſhed in derogation of the juſt claims of the creditors at large. A particular intent, therefore, to defraud, by a retention of poſſeſſion, is not neceſſary to be proved under the ſtat. 21 Jac. 1. to let in the claims of the general creditors; though the conveyance be ever ſo fair, yet the rule upon that ſtatute ſeems to be, that if the aſſignee has truſted the aſſignor with the poſſeſſion of the property conveyed, and has left him ſtill the *reputed* owner, he has thereby enabled him to acquire more credit than he ought, and by thus giving him credit, he has left himſelf liable to the caſualties of another's trade, and ſhall therefore, in caſe of the failure of ſuch perſon, come in only upon a foot with the reſt of his creditors (*e*). As the poſſeſſion of land, there-

(*e*) It ſeems not to be neceſſary to conſtitute the reputed ownerſhip within the meaning of the 21 Jac. 1. that

therefore, is not that evidence of abſolute ownerſhip which is calculated to miſlead the

that any proof of actual diſpoſition, by ſuch reputed owner, ſhould be made out; for, if the goods were actually diſpoſed of, they would be out of the power of the aſſignees; but, according to the opinion of the late Lord C. J. of C. P. delivered in the caſe of *Lingham* v. *Biggs*, 1 Boſ. and Pull. 82. the words of the ſtatute muſt not have the abſolute ſenſe they ſeem to import, but muſt have a meaning conſiſtent with the end propoſed to be attained by the ſtatute. Therefore, if a man be the reputed owner of goods, and *appear* to have the order and diſpoſition of them, he muſt be *underſtood* to have taken upon himſelf the ſale, order, and diſpoſition within the meaning of the ſtatute; and no inconvenience will follow from this doctrine, for though poſſeſſion is always evidence of ownerſhip, and with nothing to oppoſe it, will create a reputation of it, yet it is evidence which may be ſo ſatisfactorily oppoſed as to deſtroy that reputation. As, if a reſpectable tradeſman, reſiding in a houſe in London, were to make a journey to a ſea port, and there hire a ready-furniſhed houſe; or if a man were to hire a jobb coach and horſes; all the world would ſay, as to the firſt inſtance, that ſuch perſon was the reputed owner of the furniture of the houſe in London, and not of the one he had hired; and, as to the ſecond inſtance, it is notorious that people do not always drive their own coaches, and ſuch poſſeſſion is too equivocal to create a reputation of ownerſhip. Vid. *Bryſon* v. *Wylie*, Cooke's B. L. 234. *Mace* v. *Cadell*, Cowp. 232. *Walker* v. *Burnell*,

the public, and to invite a deluſive confidence; and as common prudence demands that before we truſt to a man's ſeeming property in land, we ſhould require the production of his title deeds, the inconveniencies in the contemplation of that ſtatute are leſs likely to follow from ſuch diviſion of ownerſhip from poſſeſſion in the caſe of land, than where goods are the ſubject; at leaſt the means of obviating impoſition in the former caſe, are open to ordinary circumſpection, and *vigilantibus non dormientibus jura ſubveniunt.*

But the leading object, as has been obſerved, of the ſtatute 13 Eliz. c. 5. was to prevent thoſe colluſive transfers of the legal ownerſhip which place the property of a man indebted out of the reach of his *bonâ fide* creditors, and leave to him the beneficial enjoyment of *that* which ought in conſcience to be open to their legal remedies. Poſſeſſion, therefore, of land after an ab-

---

Burnell, Dougl. 317. *Collins* v. *Forbes*, 3 T. R. 316. *Gordon* v. *E. I. Company*, 7 T. R. 237. *Manton* v. *Moore*, 7 T. R. 67.

ſolute

ſolute conveyance, is evidence of a fraudulent deſign within the ſtat. 13 El. c. 5. And if this poſſeſſion be accompanied with acts of ownerſhip, the evidence of fraud under that ſtatute becomes very hard to be reſiſted. It may happen, however, that a man, having conveyed all his property to a truſtee for the ſatisfaction of creditors, is ſtill left in the occupation of the land conveyed as a bailiff and manager for the benefit of the truſt intereſt, with a fixed and regular ſalary. Such poſſeſſion, as it ſhould ſeem, would be no badge of fraud, within the ſtatute of 13 El. c. 5. for poſſeſſion is only evidence of fraud under that ſtatute, by being a ſtrong indication of a ſecret truſt and reſervation; but here the avowed and explicit intention of the deed could only be *anſwered* by the *poſſeſſion*; and the whole tranſaction might well repoſe on a foundation of conſiſtency and honour.

As all caſes upon the ſtatute 21 Jac. 1. c. 19. ſect. 5. turn upon the apparent ownerſhip, and the conſequent injury to fair creditors from the deception thereby induced,

induced, the operation of that ſtatute may be generally diſtinguiſhed from that of the 13 Eliz. c. 5. by adverting to that criterion, for the conveyance and continuance in poſſeſſion operate under the ſtatute of Eliz. as an *argument* of intentional fraud, but the tranſaction falls within the miſchief of the ſtatute 21 Jac. 1. by affording an *opportunity* of *committing* fraud, and by breaking through the legal equality of the general creditors. But it is to be obſerved, that the retention of poſſeſſion by a party conveying is not uncontroulable evidence under *the ſtatute* of James, any more than under the ſtatute of Elizabeth: thus it has been frequently determined that the poſſeſſion of the bankrupt is explainable by circumſtances; as where the party has been left in the bare poſſeſſion and cuſtody of goods without the power of ordering and diſpoſing of the ſame (6).

(6) *Weſt* v. *Skip*, 1 Ves. 243. *ex parte* Flyn, 1 Atk. 185.

But a difference is taken in reſpect to the operation of the ſtatute 21 Jac. between mortgages of land and chattels real, and mortgages of mere goods and moveables; ſince,

ſince, upon the principle before mentioned, where the title deeds are the natural and proper documents to refer to for aſcertaining the property, the mere poſſeſſion cannot reaſonably be complained of by the creditor, as eſtabliſhing a deceit againſt him, or as any ſenſible ground for the confidence he has repoſed. But by the great caſe (*d*) of *Ryall*

(*d*) Much induſtry was uſed in that caſe, in maintaining a diſtinction between the pignus and hypotheca, in the Roman law. It was ſaid that the pignus or pawn required an actual delivery, but that the hypotheca or mortgage did not. But the premiſes were wrong in fact, and the concluſion wrong in inference; for it was ſhewn by Mr. J. Burnet that delivery was not of the eſſence of a pawn in the Roman law, and that if the diſtinction had been rightly ſtated between the pignus and hypotheca, yet, that the hypotheca of the Romans was not of the ſame nature with the Engliſh mortgage, for an hypotheca gave only a lien without property, with a right to be ſatisfied on failure of the condition. A mortgage is an immediate conveyance, with a power to redeem, and gives the legal property. Pawns in the Engliſh law require a delivery, but give the cuſtody only and not the legal ownerſhip. The pawnee has the ſpecial, but the pawner the general property. But a mortgagee has the legal and general property in the thing mortgaged.

(7) 1 Atk. 164. *Ryall* v. *Rolle* (7), all conditional ſales of goods, where the party conveying retains the poſſeſſion, are regarded as within the ſpirit and meaning of the ſtatute 21 Jac. 1.

(8) 2 Bulſt. 285. In the caſe of *Stone* v. *Grubham* (8), wherein the doctrine was general, though the ſubject in queſtion was land, a different conſtruction prevailed as to the operation of the ſtatute 13 Eliz. cap. 5. for there it was ſaid by Coke C. J. that if an *abſolute* conveyance be made, and the poſſeſſion of the thing conveyed be retained by the party conveying, the tranſaction has the face of fraud; but if the intereſt do not paſs *abſolutely* but upon a *future* condition, continuance in poſſeſſion ſhall not in judgment of law be ſaid to be fraudulent; and this, ſaid the Chief Juſtice, is very clear. It was

---

gaged. And upon this principle, the court determined in *Ryall* v. *Rolle*, that a conditional bill of ſale, or a mortgage of goods, made the poſſeſſion by the mortgagor, a poſſeſſion permitted by the true owner, *i. e.* the conditional vendee, ſo as to bring the caſe within the ſtat. 21 Jac. 1.

likewiſe

likewiſe there obſerved by the court, that ſecrecy (*d*) is a great badge of fraud, but no concluding proof. It was then demanded, in conſequence of an objection made at the bar, in whoſe cuſtody the leaſe was after the gift; to which it was anſwered and proved that the ſame was in the cuſtody of Sir R. S. to whom the aſſignment was made (*e*).

In reading the caſe of *Edwards* v. *Harben* (9), it is difficult to preſerve the mind from confuſion as to the diſtinct principles of the ſtatutes 13 El. c. 5. and 27 Jac. 1. c. 19. One of the grounds taken (9) 2 T. R. 587.

(*d*) Whether ſecrecy and concealment are marks of fraud will always depend upon the circumſtances of the caſe, for ſometimes they are not only innocent but prudent. See Sid. 134. and *Bath* and *Montague*'s caſe, 3 Chan, Ca. 105. *per* Holt C. J.

(*e*) It has been reſolved, that though the mortgage be forfeited at law, continuance of poſſeſſion in the mortgagor, is no badge of fraud within the ſtatute of Elizabeth, for this falls within thoſe caſes to which the rule applies, which ſays, that a tranſaction good at the commencement ſhall not become fraudulent by matter *ex poſt facto*. Vid. Lady *Lambert*'s caſe, Shepp. Touchſt. 65.

in the argument for the plaintiff was the injurious conſequences probable to ariſe from the foundation of falſe credit, which was laid in the defendant by his apparent ownerſhip, and thus far he was making out a caſe for the operation of the ſtatute 21 Jac. 1. but when he coupled with this propoſition the inference of proſpective fraud in the defendant from the rule that every man is preſumed in law to intend the probable conſequences of his own acts, the caſe was brought within the ſcope and meaning of the ſtat. 13 Eliz. for it is only by fixing upon it the implication of fraudulent intent that contrariant poſſeſſion can be made to attract the principle of that ſtatute. Thus it was not among the badges of fraud ſpecified in *Twyne's* caſe that the poſſeſſor was placed in a predicament to induce a falſe credit; but the donor was ſtated poſitively to have exerciſed acts of decided ownerſhip, to have ſold ſome of the ſheep, and to have traded and trafficked with them, whereby he defrauded and deceived thoſe who dealt with him.

By

By the unanimous opinion of all the Judges taken upon the caſe of *Bamford* v. *Baron* (10), a diſtinction was taken and ſettled as to the operation of the ſtat. 13 El. c. 5. in caſes of poſſeſſion after conveyances of goods, between ſuch bills of ſale as are to have their completion immediately, and thoſe which are proſpective to a future event; for in the latter caſe, the continuance of poſſeſſion in the vendor till that future time, or till the condition performed (*f*) is conſiſtent with, or, in the language in which the rule is expreſſed, accompanies and follows the deed.

(10) 2 T. R. 594, note.

In the above cited caſe of *Edwards* v. *Harben* the ſame doctrine was recognized and confirmed. And there the caſe of *Bucknal* v. *Roiſton* (11) was referred to, which appears to be rather a ſtronger caſe than either of the foregoing. Brewer, having ſhipped a cargo of goods, borrowed of the

(11) Prec. in Chan. 287.

(*f*) Vid. *Lady Lambert's* caſe, Shepp. Touchſt. 65. and vid. *Stone* v. *Grubham*, 2 Bulſt. 225. being good at the commencement; it ſeems it ſhall continue ſo, according to thoſe caſes, notwithſtanding poſſeſſion is retained after the forfeiture.

plaintiffs 600 *l.* on bottomry, and at the ſame time made a bill of ſale of the goods on board the ſhip (which were invoiced particularly,) and of the *produce and advantage thereof* to the plaintiffs; and this was in the nature of a ſecurity, or pledge for the repayment of the 600 *l.* upon the ſhip's reigning (as it was called) three years. The ſhip performed her voyage, and returned home richly laden; but it happened that Brewer died at ſea upon his return home, and the defendant Royſton, who was a creditor by judgment obtained before the ſale of theſe goods *for* 1500 *l.*, took out adminiſtration, and poſſeſſed himſelf of the effects of Brewer. The plaintiffs brought their bill to have an account and diſcovery of thoſe goods, and to have ſatisfaction for the produce and advantage that was made thereof. It was urged for the defendants that Brewer's keeping poſſeſſion of the goods after the ſale made it fraudulent and void as to creditors; but the Lord Chancellor Cowper was of opinion that the truſt of the goods appeared upon the very face of the bill of ſale; that, though they were ſold to the plaintiffs, yet

Brewer

Brewer was intruſted by the plaintiffs to negociate and ſell them for their advantage; and Brewer's keeping poſſeſſion of them was not to induce a falſe credit, but for a particular purpoſe agreed upon at the time of the ſale: that it was true that in the caſe of a bankrupt, ſuch keeping poſſeſſion after a ſale would make the ſale void againſt his creditors by the ſtatutes: but that, in the caſe under conſideration, the plaintiffs were entitled to the truſt of theſe goods immediately upon the ſale, and to all advantages conſequential upon ſuch truſts, and might follow the goods for that purpoſe.

The ſame diſtinction was adopted by Lord Mansfield as the foundation of his judgment in the caſe of *Cadogan* v. *Kennet* (12), where his Lordſhip obſerved, in anſwer to the argument from poſſeſſion, that it was a part of the *truſt* that the goods ſhould continue in the houſe. But, according to the determination of *Edwards* v. *Harben*, where the conveyance is *abſolute*, and without an alteration of poſſeſſion, the tranſaction is fraudulent in point

(12) Cowp. 432.

of law; and it was ſaid by Sir Edward Northey (13), in *Bucknal* v. *Roiſton*, that it had been ruled forty times in his experience at Guildhall, that if a man ſold goods, and ſtill continued in poſſeſſion as viſible owner of them, ſuch ſale was fraudulent and void as to creditors, and that the law had always been ſo holden.

(13) Prec. in Chan. 287.

In a very late caſe, however, in the Common Pleas (14), a point aroſe upon the queſtion of the inferibility of fraud from poſſeſſion after a ſale of goods, not readily reſolvable by the *criterion* laid down in *Edwards* v. *Harben*. In the caſe above alluded to, which was tried before Lord Eldon C. J. at the Weſtminſter ſittings after Michaelmas term 1799, notwithſtanding poſſeſſion did not accompany and follow the deed, his Lordſhip left it to the jury to judge from all the circumſtances taken together, whether fraud could be properly imputed to the plaintiff or not. The caſe was thus: An execution having iſſued againſt the goods of A. his furniture was taken and put up to ſale by the ſheriff of Surry; B. who was the brother-

(14) *Kidd* v. *Rawlinſon*, C. P. Hil. Term 1800. 2 Boſ. and Pull.

ther-in-law of A. but not a creditor, became the purchaſer, and a bill of ſale was made out to B. dated the 13th of November 1798: nevertheleſs A. was permitted by B. to continue in poſſeſſion of the goods, in order that he might be able to carry on his buſineſs; but being ſoon after arreſted and committed to priſon, he executed a bill of ſale of the ſame goods, dated the 11th of March 1799, to the defendant, to whom he was indebted in the ſum of 15*l.* 5*s.* The defendant having taken poſſeſſion according to the laſt bill of ſale received a notice from B. not to diſpoſe of the goods, ſtating his prior title. On the 14th of March the landlord of the premiſes authorized the defendant to diſtrain to the amount of 12*l.* 10*s.* for rent due from A. for two quarters, which the defendant paid, and on the 26th of the ſame month ſold the goods for 26*l.* 14*s.* 6*d.*; the expences of the bill of ſale to the defendant of keeping poſſeſſion, and of the auction, added to the rent advanced by the defendant, amounted to 26*l.* 4*s.* 8*d.* leaving a balance in the hands of the defendant of 9*s.* 8*d.* The title of the defendant under

the ſecond bill of ſale was conteſted by B., the aſſignee in the firſt, by an action to recover the produce of the ſale made by the defendant, after deducting the amount of the rent paid to the landlord. And the jury, being directed by the Chief Juſtice to conſider whether the plaintiff had purchaſed the goods to defeat any execution by the reſt of the creditors of A., were of opinion that the purchaſe was not made with that view, and gave a verdict for the plaintiff accordingly. But an endeavour being made in the ſucceeding term to ſet aſide this verdict on the ground *that* the firſt bill of ſale, being not accompanied and followed by the poſſeſſion according to the doctrine of *Bamford* v. *Baron* and *Edwards* v. *Harben*, the bench was unanimous in ſupporting the verdict.

The Lord C. J. remarked that the plaintiff was not a creditor of A. and did not buy the goods as the means of ſatisfying any debt of his own, nor, indeed, could he ſo do, for the ſheriff was to receive the money produced by the ſale; nor was the purchaſe made with a view to defeat creditors,

creditors, but out of mere kindneſs to A. to whom the plaintiff was related; that if, under theſe circumſtances, the bill of ſale was fraudulent, the plaintiff muſt ſuffer the legal conſequences of his benevolent diſpoſition. But his Lordſhip ſaid, that, as it ſeemed to him, this did not fall within the principle of *Twyne*'s caſe, and the other caſes on the ſubject, where the parties ſtood in the relation of debtor and creditor, and where it was their intention to defeat the other creditors; that it appeared to him to be a *new* caſe; for that the goods were purchaſed at a public ſale by a perſon who had never acquired the character of a creditor, and were then lent to the original owner for a temporary and honeſt purpoſe. If Kidd had lent the money to A. to buy theſe goods, and had then taken a conveyance of the goods as a ſecurity for his debt thus ariſing out of the mere act of lending the money, leaving A. in poſſeſſion of the goods, that would not have been a fraudulent act; for which his Lordſhip cited the Law of Niſi Prius, fo. 258. where Mr. Juſtice Buller, after ſtating the caſe of a convey-

ance which was holden to be fraudulent, becauſe the donor continued in poſſeſſion, added, that " the donor's continuing in poſſeſſion was not in all caſes a mark of fraud; as where a donor lends his donee money to buy goods, and at the ſame time takes a bill of ſale of them for ſecuring the money." It would be difficult, continued his Lordſhip, to diſtinguiſh the tranſaction in queſtion from that caſe, unleſs indeed in the circumſtance of the public ſale by the ſheriff, which certainly was a diſtinction greatly in favour of the plaintiff; his Lordſhip added, *that it* appeared to him at the trial that Kidd might be conſidered as the donor of theſe goods, or as lending money to A. to purchaſe them through the medium of the ſheriff, and taking a bill of ſale as a ſecurity for the money, which way of conſidering it would bring it into identity with the caſe put by Mr. Juſtice Buller in the paſſage from his Niſi Prius above cited. Mr. Juſtice Heath adverted to the notoriety of the ſale, as being correſpondent to the advice given by Lord Coke in *Twyne*'s caſe, who recommends that a *gift* in

in ſatisfaction of a debt by one who is indebted alſo to others at the time, be made in a public manner, before the neighbours, and not in private, for ſecrecy is a mark of fraud.

Nothing need be added, by way of elucidation, to the opinion of the bench, unleſs it be obſerved, for the ſake of connecting it with the principles of a former page, that the ſale by the ſheriff was in itſelf an act compleated; it was executed under the authority and according to the exigency of law, and every object of that tranſaction was obtained. The creditor, for whoſe debt the levy was made, was not the party that granted the indulgence by permitting the poſſeſſion, but the poſſeſſion originated afreſh in a new gift by the purchaſer; for the manual proceſs of giving and receiving could not be neceſſary to give to the tranſaction its ſubſtance and character. Though the poſſeſſion was not literally tranſplanted, it grew, by virtue of the permiſſion of the purchaſer, upon a different ſtock from that to which it at firſt belonged. The poſſeſſion, therefore, could not

not be coupled with the execution and ſale by the ſheriff, ſo as to attach upon *them* any mark of fraud. And as to the tranſaction which followed the purchaſe from the ſheriff, it ſeems improper to divide it into two diſtinct conſiderations by ſuppoſing A. to remain the viſible owner, and then to make a freſh conveyance to B. contradicted by his retention of poſſeſſion, for in ſubſtance a new poſſeſſion accrued by the gift of the plaintiff, or rather the ſubſequent poſſeſſion, of A. *was* the gift of the plaintiff, *originally* modified by the bill of ſale, which ſhaped it into *a loan* or qualified temporary enjoyment at the very moment in which the new poſſeſſion was given. The whole queſtion ſubmitted to the jury was, whether ſuch poſſeſſion was a meditated fraud, and the court did not mix with the conſideration the danger of a deluſive credit to be obtained by ſuch ſpurious ownerſhip, which, unleſs by fair inference ſuch conſequences can proſpectively be coupled with the tranſaction, ſeems to be excluſively the queſtion under the ſtatute of bankrupts 21 Jac. 1. c. 19.

Our

Our notions can only be rendered clear upon this ſubject by diſtinguiſhing theſe caſes of poſſeſſion retained after a conveyance which admit of a natural explanation, ſo as to reconcile ſuch poſſeſſion with the nature and purport of the conveyance, from all thoſe inſtances where the poſſeſſion, ſo far from making an integral part of, or, if the expreſſion may be allowed, from being in harmony with the tranſaction, is at variance with its obvious and oſtenſible deſign.

It ſeems proper in the next place to obſerve, that the intention of the parties cannot affect and qualify a legal proceeding ſo as to render any poſſeſſion tenable and ſecure, that contradicts the intention of the law. Thus, in the caſe cited by Sir Edward Northey in arguing for the defendant in *Bucknal* v. *Roiſton* (15), where A. took out execution againſt B. by agreement between them, and B. was ſuffered to retain poſſeſſion of his goods upon certain terms, and afterwards C. obtained judgment for a debt againſt B. and took his goods in execution, C. was juſtified by law in ſo doing, ſince the firſt execution was clearly fraudulent and

(15) Prec. in Chan. 286. et vid. 1 Vez. 245. 456.

and void againſt him. And as the ſheriff is bound to take notice at his peril of the property in the goods (16), queſtions on theſe points, often ariſe in actions againſt the ſheriff for a falſe return. Thus (17) where it was proved in an action for a falſe return, that the warrant upon a *fieri facias* was directed to three perſons, one of whom was a ſpecial bailiff; and that the plaintiff's attorney was preſent at the time of executing it, and ordered the ſpecial bailiff to uſe the defendant in the firſt action kindly, and not to take any of his houſehold goods; and that another of the bailiffs *rode round* the farm and grounds and ſaid "I ſeize all this corn and cattle for the uſe of the plaintiff," and took ſome account thereof; and afterwards the defendant's landlord ſued out a *fieri facias*, and the ſheriff's bailiffs not being in poſſeſſion of the goods under the former writ, nor having left any body for the cuſtody thereof, procured his execution to be executed; and the ſheriff returned *nulla bona* to the plaintiff's writ; it was left to the jury to ſay whether the firſt execution was fraudulent or not, and they found for the ſheriff.

(16) Gilb. Exec. 21. 1 Keb. 946. 4 T. R. 621.

(17) 1 Wilf. 44. et vid. 1 Ld. Raym. 252. 5 Mod. 375.

And

And ſo, in the caſe of *Rice* v. *Serjeant* (18), where A. had taken out a *fieri facias* againſt B. and procured the ſheriff to ſeize the goods, but directed him to proceed no further, and ſuffered the goods to remain in the cuſtody of the debtor; and afterwards another creditor obtained judgment againſt B. and took out execution; the queſtion being whether the ſheriff could ſeize upon the ſame goods, it was holden *per curiam* that he might, for the former was a fraudulent execution, and he was juſtified in returning *nulla bona* upon it.

(18) 7 Mod. 37.

With reſpect to another of the badges of fraud enumerated in *Twyne*'s caſe, viz. that the conveyance was made *pending the writ*, it may be remarked that although a gift made with a view to defraud creditors was void as well before as ſince the ſtatute 13 Eliz. c. 5.; and, though at common law examples of ſuch avoidance of conveyances meſne between judgment and execution are frequent even where the damages recovered aroſe in an action for a *tort*, and not

not upon any original debt or promiſe (19), yet that the inſtances are very rare, if any are to be found, of the mere *pendency* of an action's being regarded as a badge of fraud before the ſtatute in queſtion was enacted. And this ſeems to have been a point of ſome doubt even after the promulgation of the ſtatute, for in a caſe determined in the 28th year of Eliz. (20) where, an attachment having been iſſued againſt J. S., and B. in diſturbance of the ſaid proceſs having ſhewed to the ſheriff a conveyance by which he claimed the goods, the queſtion was, whether ſuch avowing of the conveyance was within the ſtatute, as it did not go in delay of execution, no *judgment* being given, but only in delay of proceſs; but the court held *contra* by reaſon of the words of the ſtatute, *delay, hinder, or defraud creditors of their juſt and lawful actions, ſuits, &c.* And it appears that Periam and Rhodes, Juſtices, conceived, that, avowing ſuch conveyance, though *no ſuit* were depending, was within the ſtatute: though of this Anderſon, C. J. doubted. But in other caſes we obſerve that the ſtatute was more vigorouſly expounded, and that it

(19) Vid. Brook. tit. Colluſion, pl. 9. per Belknap. Id. tit. Treſp. pl. 240. Id. Execution, pl. 80. Id. Done, pl. 20. et 22. Li. Aſſ. 44. 72.

(20) 1 Leon. 47.

operated to remove this heſitation of the courts, by confirming their diſpoſition in diſfavour of voluntary conveyances, whereby creditors were defeated of their remedies, and, in general, to colour more ſtrongly the conſtructive indications of fraud for the protection of valuable rights.

A great caſe (21) upon this ſubject took place in the 12th and 13th years of Queen Elizabeth, in Michaelmas term, which was in ſubſtance as follows: In an action of debt on a bond for one thouſand marks, the defendant pleaded conditions performed; and the parties being at iſſue upon a particular point, the defendant, ſuppoſing it certain that the iſſue would be found againſt him, enfeoffed divers perſons, *i. e.* three of his friends, by deed indented, to the uſe of his eldeſt ſon in tail, remainder to the uſe of his ſecond ſon in tail, with divers remainders over; the ultimate remainder being limited to the right heirs of the feoffor; and the deed contained a proviſo, that if at any time the feoffor ſhould pay or tender a piece of gold of ten ſhillings

(21) Dyer 295. a.

lings value to any of the feoffees, all the uſes ſhould be extinct, and that the feoffees ſhould ſtand ſeized to the uſe of the feoffor and his heirs. Notwithſtanding the feoffment the feoffor continued to receive the profits of the land comprized in the deed. And all this matter was found by the inquiſition of a jury, and returned by the ſheriff upon an elegit, with the value of the lands, and the return expreſſed that the ſheriff and the jury were in doubt whether the lands were liable to an execution as to a moiety; and they accordingly prayed the advice and directions of the *juſtices upon* the bench. But while this matter was depending, and probably in conſequence of the doubts entertained by ſome of the bench upon the queſtion, the ſtatute chap. 4. of the 13th year of the queen was enacted, with a relation of effect to the beginning of her reign; and in Trinity term following a pluries elegit was awarded. The former writ and return were not recorded, by reaſon of the difference in the opinion of the juſtices; but a continuance was entered upon the roll by *comes non miſit breve, &c.*

If,

If, in the caſe above cited, the *pendency of the writ* was a clear badge of fraud at common law, the ſheriff ought to have returned the covin (20) upon the firſt elegit; but whether the caſe diſcloſed ſufficient teſtimony of fraud ſeemed to be the doubt. What ground there was for the doubt need not now be determined, though if that were neceſſary, it ſeems, that the *principles* of the common law, as now underſtood, would have warranted the jury in finding fraud upon the firſt elegit without the ſanction of the ſtatute 13 Eliz. It is very *clear*, however, that if the alienation had been ſubſequent to the judgment, the *precedents* at common law would have ſufficiently authorized them in finding the covin, and no doubt can be entertained but that, under the ſtatutes 50 Ed. 3. c. 6. or 3 H. 7. c. 4. if the debtor, before any writ taken out againſt him, had fled to a privileged place after a conveyance of his property in truſt, execution might have been awarded and executed againſt him as if no ſuch gift had been made. But ſince this ſtatute 13 Eliz. the *pendency of a writ* has always been regarded as a conſiderable badge of fraud, and a

(20) Roll. Abr. 549.

ground for a ſtrict enquiry into the conſideration by which a conveyance has been induced. Nor does it ſignify whether the ſuit is in Equity or at Law, for where a defendant made a conveyance to his ſon, prior to a *decree* in the court of Chanery, but *pending the ſuit*, ſuch conveyance was not ſuffered to defeat the ſubſequent decree (21).

(21) 1 Vern. 459. *Goldſon* v. *Gardiner*, cited in *Self* v. *Maddox*.

But after *judgment* has been obtained, a conveyance by a defendant of his goods or chattels has always been looked upon as wearing a very deep complexion of fraud (*g*); and as ſubjecting to a very

(*g*) By the caſe of *Turvil* v. *Tipper*, Latch. 222. it appears, that where a *bailiff of a manor*, in anſwer to an action of treſpaſs for diſtraining goods, juſtified by virtue of his authority, and that by his precept he was commanded to diſtrain the goods of A. which goods came to the hands of the plaintiff by colour of a fraudulent gift of them to the plaintiff; on iſſue whether the ſale was made *bonâ fide*, it was found for the plaintiff and adjudged for him, although it was objected that he being *no creditor*, could not take advantage of the ſtatute. The reaſon of which reſolution was, that if a bailiff ſhould not be aided by 13 Eliz. c. 5. becauſe he is not a creditor, no meſne proceſs could be executed; and when a ſtatute gives the *principal* it gives all the *accidents*. Vid. Vin. Abr. tit. fraud. F. pl. 11.

jealous

jealous examination the caſe both of the alienor and alienee. Thus it has been determined, that if the buyer have *knowledge* of the judgment (*b*) againſt his vendor, notwithſtanding a full price was given, the ſale is void, and within the purview of the ſtatute 13 Eliz. (22). And where in the court of Chancery, A. being decreed to deliver poſſeſſion of a houſe, or pay a ſum of money to B. by a certain time, conveyed the houſe to a creditor, *in ſatisfaction of a real debt by bond*, this was not ſuffered to defeat B. of the benefit of the decree (23): in other words the creditor in equity might have had a ſequeſtration

(22) Vin. tit. Fraud. x. pl. 3. Dougl. 88.

(23) Vern. 460. *Self* v. *Maddox.*

(*b*) But it ſeems clear, that if a man purchaſes for a full price, *with notice* that his vendor is indebted by bond, his title will not be affected by ſuch debts in equity. He need look no further than his title; and the bond-debt is no part of his title till it is placed on the land by a judgment. So alſo if a man purchaſes the land for valuable conſideration from the heir, with notice of the anceſtor's bond-debts, it ſeems that ſuch bond-debts will not affect the purchaſer in equity, ſo as to make him liable for the application of the purchaſe-money. Gilb. *Lex Prætoria*, 293.

of the leaſe (*i*). Conuſors of ſtatutes and recognizances are not, as before has been obſerved, in a predicament to raiſe the queſtion upon this ſtatute in reſpect to their alienations of their fee ſimple lands (24); for their fee ſimple poſſeſſions, of which they were ſeized on the day of their becoming bound, or at any time ſince, remain liable to their debts, into *whoſe hands ſoever* they may come (25). And it appears in *Lord Anderſon*'s caſe (26), that,

(24) Vid. ſupra 462.

(25) 3 Rep. 82.

(26) 7 Rep. 21.

(*i*) And yet a ſequeſtration upon a decree is only perſonal proceſs, and does not affect the land immediately as an extent upon a judgment does; the contempt is the foundation for the ſequeſtration, for the decree acts only againſt the perſon; vid. Ca. Temp. Talb. 223. 1 Vez. 496. 2 P. Wms. 621. There are caſes at law where a defendant attempting to diſcharge himſelf of a *perſonal* liability *ariſing* from *property*, has been fruſtrated by this act of Elizabeth. As where an heir before 3 & 4 W. & M. c. 14. aliened by covin before the writ purchaſed, if the covin was found, the heir continued liable becauſe the land continued aſſets, Dyer, 148. b. note. And if in debt againſt an aſſignee for arrears of rent, defendant pleaded an aſſignment before the rent was in arrear, the leſſor might reply that the aſſignment was made by fraud to defeat the plaintiff of his action for the rent, and if the covin was found the plaintiff muſt have judgment for his rent notwithſtanding the aſſignment, though ſuch aſſignment was a legal act. Sir Thomas Jones, 109. Sir Thomas Raym. 303.

by

by the 33 H. 8. c. 39. the lands in *tail* of debtors to the *king* by judgment, recognizance, obligation, or other ſpecialty, remain liable to ſuch demands in the hands of the heir in tail. In *all* caſes the bond to the crown has the force of a ſtatute ſtaple; and by the ſtatute 13 Eliz. c. 4. the accountants and officers of his majeſty, therein enumerated, are made liable to the payment of their debts to the crown in the ſame manner as if they were bound in a ſtatute ſtaple. A felon or traitor, after the felony or treaſon committed, and before conviction, may ſell *bonâ fide* for his ſubſiſtence his chattels real or perſonal. And it ſeems, that whether the debtor is bound by ſpecialty ſtatute or recognizance, or ſubject as an accountant to the crown (27), a ſale of his chattels *bonâ fide*, after judgment and before execution, delivered (*k*) to the ſheriff, is good and unavoidable (28).

(27) 8 Rep. 171.

(28) Dalr. Sh. Execution Stat. 187.

It has been frequently held that if a man alien his lands, with intent to commit

(*k*) Vid. ſtat. 29 Car. 2. c. 3. § 16.

a *forfeiture*, and afterwards is guilty of felony, the lands ſhall be forfeited (29). And it ſeems, that if the conveyance be plainly voluntary, and the commiſſion of the crime whereby the forfeiture is incurred follow ſhortly after the conveyance, the inference of fraud is incontroulable. Thus if a man make a feoffment of his land, to the uſe of his ſon, and not upon communication of marriage, and ten days afterwards commit treaſon of which he is attainted, this ſettled land ſhall be forfeited to the king; for the feoffment ſhall be adjudged fraudulent and void as *to the* king (30); but where ſuch feoffment was made in purſuance of an agreement entered into a year before, whereby it had been agreed that in conſideration of a ſettlement made by his wife, in ſuch manner, the feoffor ſhould make the ſettlement upon his ſon as therein mentioned, the conveyance was held good againſt the crown (31). In *Pauncefoot*'s caſe (32), the word *forfeitures* in the ſtatute 13 Eliz. c. 5. was holden not to be reſtricted in ſenſe to forfeitures of obligations and recognizances, &c. (as by ſome was maintained to be the proper conſtruction

(29) Vid. Roll. Abr. 34.

(30) Vid. Vin. tit. Fraud, A. pl. 1.

(31) Id. ibid.

(32) Lane, 44, 45. 3 Rep. 82.

conſtruction of the ſtatute, the word *forfeitures* being placed after the words *damages* and *penalties*) but to extend to every thing which by law can be forfeited to the king or to a ſubject. And in *Jones* v. *Aſkart* (33), it was holden by Chief Juſtice Holt, that a bill of ſale of all his goods made by a man in Newgate for a roberry, by way of proviſion for his ſon, the donor being afterwards convicted and executed, was fraudulent; for though a ſale *bona fide*, and for valuable conſideration, would have been good, becauſe the party had a property in the goods *till* conviction, and was entitled to be ſuſtained out of them, yet that ſuch a conveyance was fraudulent at *common law*, for it could not be intended to be made to any other purpoſe, than to defraud the crown.

(33) Skin. 357. pl. 4.

Thus alſo in the caſe of *Sir Walter Raleigh* (34), who being poſſeſſed of a term of one hundred years, and intending to purchaſe the reverſion in fee of the land, conveyed his term to his eldeſt ſon to prevent its being drowned, and afterwards purchaſed the fee, and a long time afterwards

(34) Lane, 48.

was attainted of treaſon, it was adjudged that the king ſhould have the land in poſſeſſion *diſcharged* of the leaſe, although *no fraud* was found in the caſe, but rather the contrary; but as it appeared upon evidence that Sir W. took the profits of the land, and held courts in his own name till the attainder, and as ſuch aſſignment was apparently in truſt, it was holden to be fraudulent and void as againſt the king. And in *Ford* v. *Sheldon* (35), it was holden that, where a man, who was a recuſant or chargeable to the king for a forfeiture, took recognizances in the *names* of others, all ſuch recognizances after the 13 El. ſhould be *preſumed in law* to be taken with intent to defeat the king of his forfeiture; and that by the common law ſuch attempt to defraud the king was void, whether the forfeiture accrued by act of parliament or by common law.

(35) 12 Rep. 1.

But the title of the crown which, as appears from what has gone before, has the full advantage of this ſtatute in defeating all colluſive tranſactions, is not to be affected in its turn by any conſtructive fraud in its

its own officers by delaying execution, or in ſuffering a continuance of poſſeſſion in the debtor, for *rex fallere non* vult, *falli autem non* poteſt. Even actual colluſion between the officers of the crown and the debtor, cannot deprive the crown, as againſt third perſons, from having its execution perfected according to its title, which accrued from the teſte of the writ.

In *Twyne*'s caſe, as it is reported in Moore (36) by the name of *Chamberlayne* v. *Twyne*, the following circumſtances are enumerated as badges of fraud: 1. The deed of gift was general, without any exception: 2. It was antedated, and direction was given to the attorney to uſe his ſkill to prevent its being defeated: 3. The making and ſealing it was in the abſence of the donee (*l*): 4. It was agreed to be kept ſecret: 5. The donee never had poſſeſſion of the deed, but it was kept by the brother of the donor (*m*): 6. The

(36) Moore, 638.

(*l*) Vid. Lane, 44. id. 102. The definition of covin in Plowd. 54. ſeems too narrow.

(*m*) Vid. Finch. Rep. 270. *Oakever* v. *Pittus.*

donor

donor himſelf had the uſe of the goods, dwelt in the houſe, bought and ſold, killed the cattle, changed them, and ſpent the corn in his family; and all this was coloured by an account made out annually, between the donor and donee; but no money was actually paid to the donee: 7. The donor, after the deed, being aſſeſſor, aſſeſſed *himſelf* to the ſubſidy ſeven pounds; whereas, if the deed was good, he had nothing: 8. The donee took out an extent upon a ſtatute afterwards, againſt the goods of the donor, for a debt owing to him. And for theſe reaſons, *according to this* report of the caſe, the deed was adjudged fraudulent.

SECTION IV.

It ſeems ſafe to affirm, that in general where a thing is by law forbidden to be done, the prohibition extends to every circuitous mode of effecting the ſame; for *dolus circuitu non purgatur*, and what cannot be done *de directo*, ought not to be done *per obliquum*. Thus in the caſe of *Magdelen College* (1), it was ſaid by the Chief Juſtice, that if one who intends to ſell his land, conveys it by deed inrolled to the king, with intent to deceive a purchaſer, and afterwards ſells the land to another for valuable conſideration, and makes a conveyance accordingly; in that caſe the purchaſer ſhall enjoy the land *againſt the king*, by virtue of the ſtatute 27 Eliz. c. 4. for the act being general and made to ſuppreſs fraud, ſhall bind the king. And if tenant in tail (2) be ſeized of land, with remainder over in tail or in fee, and he in remainder knowing that the tenant

(1) 11 Rep. 74. a.

(2) 11 Rep. 74. b.

tenant in tail intends by recovery to bar the remainder over and alien the land, in order to deprive the tenant in tail of his birth-right, and of the power which the law gives him of barring ſuch remainder, and in order alſo to deceive the purchaſer, grants his remainder to the king by deed inrolled, and afterwards the tenant in tail, for a valuable conſideration, aliens the land by common recovery and dies without iſſue, the purchaſer ſhall enjoy the land againſt the king by the ſaid ſtatute 27 Eliz. the words of which are that "every conveyance, &c. made, &c. to the *intent and* of purpoſe to defraud and deceive any purchaſers, &c. ſhall be deemed only againſt ſuch purchaſers, &c. to be utterly void;" in which words, ſays the report, it is to be obſerved that ſuch former fraudulent conveyance, is not only reſtrained, when made by the *vendor himſelf*, but *generally* that every conveyance, made of purpoſe and with intent to deceive a purchaſer, ſhall be void(*a*). And therefore the conveyance of the re-

(*a*) The reader will apply this comment to the diſcuſſion of the point in page 377. et ſeq.

mainder

mainder to the king of purpoſe and with intent to deceive a purchaſer, is directly within the words and purview of that act; and of ſuch opinion, ſays the great reporter, was Popham, Chief Juſtice, openly in the exchequer chamber; for the king ſhall never be made an inſtrument of deceit, *et cum ſit author juris, non debet inde injuriarum naſci occaſio unde jura naſcuntur.*

Fraud may be paſſive as well as active: thus it was ſaid in the margin of *Verney*'s caſe, in Dyer's reports (3), that where there was judgment in debt againſt A. and he ſuffered himſelf to be outlawed in felony with intent to defraud his creditor, and afterwards purchaſed a pardon, and had reſtitution, the plaintiff, nevertheleſs, had his execution for the manifeſt fraud (*b*). Thus, too, all fraudulent judgments and executions are within the ſtatute 13 Eliz. and it ſeems clear

(3) Dyer, 245. b. *Verney's* caſe.

(*b*) The law ſeems now to be that the king's pardon ſhall enure for the benefit of creditors. And it ſeems that an *attainted* perſon may be ſerved with proceſs while in priſon at the ſuit of his creditors. Though it formerly

clear that ſuch covinous and circuitous proceedings are void by the common law (4). The abuſe of the proceſs of law to the purpoſes of fraud is a great aggravation of the offence. Nor ſhall any man avail himſelf, as it ſeems, of the operation, conſequence, or concluſion of law upon his acts, to defeat his fair creditors. Thus it was the opinion of Lord Hale, that if a tenant for life, being indebted, with a view to defraud his creditors, commits a forfeiture, in order that the reverſioner, who is privy to the contrivance, may enter, the creditor ſhall avoid the *forfeiture* as well as any fraudulent *conveyance* (5).

(4) Vid. Brook. tit. Covin & Colluſion.

(5) 1 Vent. 857.

formerly uſed to be a trick for perſons greatly indebted to procure themſelves to be indicted for ſome crime within the benefit of clergy, in order to defeat their creditors by pleading that they were attainted. Vid. Dyer, 245. b. 1 Wilſ. 217. 1 Blackſt. 30. 1 H. Blackſt. 129.

SECTION V.

THE conſtruction of theſe ſtatutes of fraudulent conveyances has always authorized the party ſeeking the benefit of them to treat the fraudulent gift as *void*, ſo that the caſe, as to him, is the ſame as if no ſuch gift had been made (1). And this appears from all the pleadings upon theſe ſtatutes. Thus in the caſe of *Leonard* v. *Bacon* (2), where the tenant pleaded non-tenure to a formedon, upon which the parties were at iſſue, and it was found that before the writ purchaſed, the tenant had enfeoffed divers perſons, to the intent to defraud thoſe who had cauſe of action for the ſame lands, and notwithſtanding ſuch his feoffment, continued to receive the profits; the demandant had judgment by virtue, as was ſaid, of the ſtatute 13 Eliz. c. 5. So in the *lex prætoria* (3) it was ſaid, that "where a man makes a voluntary conveyance, with power of revocation, and afterwards contracts bond or other debts,

(1) Vid. Dyer, 295. a.

(2) Cro. Eliz. 233.

(3) Page 293.

debts, which only bind the perſon, ſuch creditors ſuing the debtor to judgment ſhall extend the lands *in the hands of the voluntary conveyor*, and make a title in an elegit to the lands in *his* hands, notwithſtanding ſuch voluntary conveyance."

But it ſhould be obſerved, that where a man, being indebted to ſimple contract creditors, makes a plain voluntary conveyance of his real property, and dies before his creditors have obtained ~~execution~~ *judgment* againſt him upon ſuch debts, the creditors cannot follow the land with their *executions*; for as ſuch debts do not bind the heir, but merely the perſonal aſſets, ſuch creditors would gain nothing by avoiding the voluntary conveyance of the anceſtor, *ſince* if the lands were conſtrued to deſcend upon the heir as aſſets, they would not be aſſets to ſatisfy demands upon ſimple contract. And whether judgment were obtained or not in the lifetime of the anceſtor, would cauſe ~~no~~ *no* diverſity as to this point. But wherever a man makes a fraudulent gift of his goods or chattels and dies indebted, the rule upon the 13th Eliz. c. 5. has

has always been to conſtrue the gift as utterly void againſt all his creditors, and the debtor to have died in full poſſeſſion with reſpect to *their* claims, ſo that the effects are juſt as much aſſets in the hands of the perſonal repreſentative as to creditors, as if no ſuch attempt to alien them had been made; and this was the point ſecondly determined in *Bethel* v. *Stanhope* (4).

(4) Cro. Eliz. 810.

To give ſubſtantial effect to this conſtruction of law, the voluntary donee is conſidered as liable to be charged as executor *de ſon tort* if he take poſſeſſion of the goods after the deceaſe of the donor (5). And though regularly there cannot be an executor *de ſon tort*, when there is a rightful executor (6), or when adminiſtration has been duly granted, (for if after probate or adminiſtration granted, a ſtranger take poſſeſſion of the goods of the deceaſed, he is a treſpaſſer to the executor or adminiſtrator, and may be ſued as ſuch), yet it appears by the caſe of *Hawes* v. *Leader* (7), that if ſuch donee of a fraudulent gift demand and obtain poſſeſſion

(5) Cro. Jac. 271. Yelv. 197. 2 Leon. 223. per Dyer, C. J. and ſee *Edward's* v. *Harben*, 2 T. R. 587.

(6) 5 Rep. 33. Salk. 313. pl. 19.

(7) Cro. Jac. 272. 3 Leon. 57.

of the goods after the death of his donor, and after adminiſtration granted to another, he is yet liable as to ſuch goods of the deceaſed to be charged by the creditors as executor *de ſon tort*. And this ſeems to be a rule much in favour of the rightful adminiſtrator or executor, who cannot excuſe himſelf upon the ſtatute 13 Eliz. from delivering up the ſubject of his teſtator's or inteſtate's fraudulent gift to the donee if he demand it. Though it ſeems, that ſtill, if the donee, without demanding the goods given to him by the deceaſed, take poſſeſſion of them by his own act, *after* probate or adminiſtration granted, he is a treſpaſſer to the executor or adminiſtrator, who have their remedies (8) againſt him for the recovery of the goods taken; and perhaps, in ſuch a caſe, the creditors ought to treat them as aſſets in the hands of the rightful executor or adminiſtrator: for ſuch ſeems to be the rule in *Bethel* v. *Stanhope*, above cited. But, wherever the donee takes poſſeſſion after the death of the donor *before* any probate or adminiſtration granted, as was the caſe in *Edwards*

(8) Cro. Eliz. 810.

v. *Harben* (9), he is clearly and regularly an executor *de ſon tort*, and liable to the demands of creditors as ſuch (10).

(9) 2 T. R. 587.

(10) *Wilson v. Watſon*, Cro. El. 405.

If a *chattel real* be the ſubject of the voluntary and fraudulent gift, the rule of conſtruction which attaches the thing ſo fraudulently given away to the aſſets of the deceaſed as parcel of his eſtate, will equally apply. Thus where A. (11), being indebted to B., made C. his executor and died, and C. the executor, promiſed B. that if he could diſcover any aſſets, parcel of the teſtator's eſtate at the time of his death, then he ſhould have his debt ſatisfied thereout, and the queſtion was, whether a *leaſe for years* conveyed to a ſtranger by the teſtator in his lifetime fraudulently, ſhould, in law, be *parcel* of his eſtate at the time of his death or not, it was by the whole court reſolved to be parcel of the eſtate of the teſtator at the time of his death.

(11) 2 Roll. Rep. 173.

SECTION VI.

WITH reſpect to real eſtate, Lord Coke lays it down as a rule in *Fermor*'s caſe (1) that a covinous conveyance to prevent aſſets from deſcending is nothing worth. Therefore in an action of formedon where the warranty with aſſets deſcended was pleaded in bar, and the demandant replied '*reins per deſcent*,' and the jury found a fraudulent feoffment to prevent the deſcent, the aſſets were conſidered to have deſcended, notwithſtanding the feoffment (2). And, according to the greateſt authorities, a *covinous* conveyance of land is *no* conveyance *as againſt* the intereſt intended to be defrauded, and ought, by the rules of good pleading, *ſo* to be treated, where a party is ſeeking to avail himſelf of the protection of the ſtatutes of fraudulent conveyances, for the maxim is "*pro poſſeſſore habetur qui dolo deſiit poſſidere.*"

(1) 3 Rep. 78. b.

(2) Dyer 295. b. pl. 16.

Thus in the caſe of *Humberton* v. *Howgil* (3), H. recovered a debt againſt Thomas

(3) Hob. 72. and ſee Chan. Rep. 131.

Thomas Howgil, who died, and upon a *ſcire facias* againſt the tertenants, the ſheriff returned John Howgil tenant of a houſe in Yarmouth, of which Thomas Howgil deceaſed was ſeized at the time of the judgment; John Howgil came in and pleaded, that Thomas Howgil enfeoffed him long before the judgment, in fee, and traverſed, that he was ſeized at the time of the judgment or at any time after; whereupon iſſue was taken, and the jury found the feoffment, but further ſaid that it was made by covin to defraud the plaintiff and other creditors; the court, therefore, gave judgment for the plaintiff, for Thomas the anceſtor remained *ſtill ſeized as to the creditors*, notwithſtanding the feoffment. But if the iſſue had been, *enfeoffed or not*, it muſt have been found, ſays the report, *againſt the plaintiff*, for it *was* a *feoffment* ſuch as it was, and muſt have been anſwered, if the iſſue had been directly upon the feoffment, by pleading the covin ſpecially. But here the iſſue was general *ſeized or not ſeized* by the feoffment, and therefore the covin might be given in evidence when the feoffment was given in

evidence. The ſame mode of pleading was obſerved in *Leonard* v. *Bacon* (4).

(4) Cro. Eliz. 233.

That ſuch conveyance of land by the anceſtor to defeat the claims of his ſpecialty creditors upon his real aſſets, is vain, and that, notwithſtanding ſuch conveyance, the lands remain, as to the bond creditors, *parcel* of his eſtate at the time of his death, is clearly laid down in the Touchſtone (5), which ſays, that, if a man a little before his death make a conveyance of his land to his children, with a proviſo to make it void at his pleaſure, and *he take* the profits of it as his own; or make a conveyance of it to friends, to the intent that it ſhall not be ſubject to the payment of his debts, *having bound himſelf and his heirs by any ſpecialty*, or to the intent that a warranty and aſſets ſhall not bind his ſon for other land or the like; in this caſe the conveyance ſhall be void, as to thoſe whoſe remedy is upon the land by deſcent.

(5) Shepp. Touchſt. 66.

But there is an opinion of Lord Macclesfield oppoſed to this doctrine (6). That Chancellor

(6) Vid. the caſe of *Parſlowe* v.

Chancellor is reported to have ſaid, that by the ſtatute againſt fraudulent deviſes, a man is prevented from defeating his creditors by his will; but that any ſettlement or diſpoſition which he ſhall make, *in his lifetime*, of his lands, *whether voluntary or not*, ſhall be good againſt his *bond creditors*, for that was not provided againſt by the above-mentioned ſtatute, which only took care to ſecure ſuch creditors againſt any impoſition which might be apprehended in a man's laſt ſickneſs; but if he gave away his eſtate in his lifetime, *this prevented the deſcent of ſo much to the heir*, and conſequently took away the remedy of the bond creditor againſt the heir, who was only liable in reſpect of the aſſets deſcended; and as a bond is no lien whatſoever on lands in the hands of the obligor, much leſs can it be ſo when they are given away to a ſtranger. This determination, however, has been conſidered as irreconcileable with principles and authorities. In *Brunſden* v. *Stratton* (7), which came before the court of Chancery in the following year; Mr. Vernon ſaid, that, till the reſolution in *Parſlowe* v. *Weedon*, he ſhould have

Weedon, Eq. Ca. Abr. tit. Creditor and Debtor E. pl. 7.

(7) Prec. in Chan. 521.

been of opinion, that ſuch diſpoſition by a man in his lifetime as mentioned in that caſe was fraudulent againſt his creditors, and he quoted the caſe of *Templeman* v. *Beke*, tried before Lord Chief Juſtice Holt, wherein it had been ſo holden. Mr. Vernon's diſſatisfaction with the opinion of the Lord Chancellor above mentioned, increaſed with his experience and reflection, as appears from what was obſerved by Lord Talbot fifteen years afterwards, in the caſe of *Jones* v. *Marſh* (8).

(8) Cas. temp. Talbot 64.

Where an anceſtor dies *indebted by* bond, and leaves aſſets to deſcend to his heir, and the heir aliens ſuch aſſets to a *bonâ fide* purchaſer for valuable conſideration, the heir, at this day, remains liable to his anceſtor's bond creditors, by reaſon of the aſſets deſcended, whether the conveyance were antecedent or ſubſequent to an action commenced, though before the 3 & 4 W. & M. c. 14. the debtor was without remedy, if the heir had aliened before the original writ was ſued out. But ſtill the alienation by the heir to a *bonâ fide* purchaſer for valuable conſideration, puts the

land

land ſpecifically out of the reach of the creditor's *execution*, though the heir remains *perſonally* liable upon the bond to the amount of the *aſſets deſcended*. But if the heir have made a *colluſive* and *fraudulent* conveyance to defeat the creditor of his remedy upon the lands deſcended, ſuch fraudulent conveyance is void by the ſtatute 13 Eliz.; for where the heir is *expreſsly* bound with his anceſtor, the law regards it as his own debt, to the extent of the aſſets deſcended, and the writ againſt him is in the *debet* (9), as well as *detinet*; ſo that he is in the predicament of a perſon making a voluntary conveyance to defraud his own creditors. It is not, indeed, neceſſary that it ſhould be the proper debt of the perſon making a conveyance to bring the caſe within that ſtatute, ſince if an executor *not named* in his teſtator's bond, make a fraudulent conveyance of the perſonal aſſets, the creditors of the teſtator ſhall avoid ſuch conveyance by virtue of the 13 Eliz. c. 5. (10); the rule upon which ſtatute, as to this point, ſeems to be, that by ſuch fraudulent conveyance nothing paſſes, as to creditors, out of the grantor, but that the property, though

(9) 2 Leon. 11. *per* Dyer. Brook. debt. 238. Plowd. 441. Poph. 155.

(10) Cro. Eliz. 405.

though effectually conveyed to ſome purpoſes, remains as aſſets in the hands of the repreſentative to anſwer the demands of the anceſtor's or teſtator's creditors.

(11) 5 Rep. 60.

Thus in *Gooch*'s caſe (11), a creditor brought an action againſt the heir upon the anceſtor's bond, to which the defendant pleaded *reins per deſcent*; the plaintiff replied that he had aſſets at I. in the county of Suffolk; and at *niſi prius* before Wray Chief Juſtice, one of the counſel gave in evidence for the plaintiff, that the defendant's father was ſeized of the lands at I. in fee ſimple, and died thereof ſeized, and that they deſcended to the defendant, by which &c. All which was admitted on the other ſide; but it appeared in evidence for the defendant, that a long time before (*a*) the action was brought, the defendant had enfeoffed one G. W. in fee of the lands, which was alſo confeſſed; but it was moreover alleged and proved by the plaintiff's counſel, that the feoffment by the defendant was made by covin to de-

(*a*) Since the ſtatute 3 & 4 W. & M. c. 14. ſ. 6. this defence cannot avail.

fraud

fraud the plaintiff of his action, and was therefore void by the ſtatute 13 Eliz. c 5. as to the plaintiff; and judgment was given for the plaintiff by the court, after it had been reſolved by the Chief Juſtice that the fraud was proper to be given in evidence, without being *ſpecially* averred, upon the general queſtion on the pleading in that caſe, i. e. *whether aſſets or not* (*b*).

In a caſe ſtated in the margin of Dyer's reports (12), where R. brought an action of debt againſt B. upon his anceſtor's bond, who pleaded *reins per deſcent*, at the day of the writ purchaſed, (which was a good defence before the ſtatute 3 & 4 W. & M. c. 14.), it being found that *before* the writ was ſued out, the heir had aliened the aſſets by *covin* to defraud the plaintiff of his remedy, judgment was given upon the general plea for the plaintiff; and it was reſolved that it was well found for him upon the inquiſition of aſſets by deſcent.

(12) Dyer 149. a. note (80.)

(*b*) The mode of pleading in this caſe was agreeable to the principle in *Humberton* v. *Howgil*, Hob. 72. and *Lenard* v. *Bacon*, Cro. Eliz. 233.

And

And in the anonymous caſe reported in the ſame page of Dyer, in which debt was brought againſt the heir upon the bond of the anceſtor, it was ſtated to be the opinion of Brook that, at common law (*c*), if the alienation were found by inquiſition upon the elegit, to be made, pending the writ, by covin, and this returned by the ſheriff, a new writ of elegit ſhould iſſue reciting the covin, &c.

To underſtand which opinion of Brook it muſt be remembered that ſince the ſtatute 3 & 4 W. & M. c. 14., ſuppoſing fraud to be out of the queſtion, the heir indebted upon his anceſtor's bond may alien the aſſets deſcended, ſo as to put them *ſpecifically* out of the reach of the ſpecialty creditor, and that before the ſaid ſtatute of W. & M. ſuch alienation before the writ ſued out, not only gave a good title to the purchaſer, but entirely deſtroyed the plaintiff's *remedy* by diſcharging the perſon of the heir, who

(*c*) The caſe was adjudged in T. T. 3 & 4 P. & M.

might

might plead that he had no aſſets deſcended *at the time of the original writ ſued out.* By the direction of the ſtatute 3 & 4 W. & M. the jury are to enquire of the *value* of the aſſets deſcended, where the plaintiff by his replication brings himſelf within that ſtatute by replying to the plea of *reins per deſcent* that *before* the day of the writ the defendant had aſſets by deſcent in fee ſimple, and the judgment is to recover *pro tanto*, with reſpect to the value of the aſſets; but at common law, where the defendant pleaded *reins per deſcent* on the day of the writ purchaſed, and it was found againſt him, the judgment was *general* (*d*), and a general execution

(*d*) This was ſaid by Holt C. J. to have been always holden for law, ſince the caſe of *Davie* v. *Pepys*, Plowd. 440. Vid. 2 Lord Raym. 786. So alſo, the judgment was *general* if given by default, *nil dicit*, or by confeſſion, againſt the heir, or upon any ground or matter whatſoever without a confeſſion of the aſſets deſcended, and the certainty of them being ſhewn, vid. Moore 522. Cro. Eliz. 693. 2 Leon. 11. in point, and ſee Raſt. Entr. 172. b. pl. 5. And in ſuch caſe the court could not give a ſpecial judgment, unleſs the plaintiff aſſented to it, and then they might. 2 Roll. Abr. 71. and it ſeems

tion was awarded againſt the lands and tenements of the heir, as of his proper debt, without ſaying in the writ, *of the lands which he had on the day of the judgment given*; for the ancient form of the elegit, was without limitation of time; and upon a ſpecial return of the ſheriff that the defendant had no lands or tenements, but had aliened whatever he had, a new writ of *elegit* with a *teſtatum eſt* that he had aſſets pending the writ, iſſued to the ſheriff, wherein he was commanded to ex-

---

ſeems that *Leuſon*'s caſe in 1 Dyer, fo. 80. b. which is contrary to theſe authorities, cannot be law.

But by the ſtatute 3 & 4 W. & M. c. 14. where judgment is given againſt an heir, in an action on his anceſtor's bond, by confeſſion of the action, without confeſſing the aſſets deſcended, or upon demurrer or *nihil dicit*, it ſhall be for the debt and damages generally, without any writ to enquire of the lands, tenements, or hereditaments, ſo deſcended, Carth. 354. But if the heir plead *reins per deſcent*, and the plaintiff reply according to the ſtatute 3 & 4 W. & M. that the defendant had aſſets by deſcent *before* the writ or bill ſued out, the judgment and execution *muſt* be ſpecial, and the jury are to enquire of the *value* of the lands deſcended, and there can be no *general* judgment in ſuch caſe againſt the heir, as at common law, for his falſe plea.

tend

tend what the defendant had on the day of the *jurata*, i. e. the day of ſigning the judgment, becauſe the day of the *jurata* and the day in bank were the ſame day in law. So that the ſheriff could only, where there was no covin, extend upon this *teſtatum elegit*, the *deſcended lands* or real *aſſets*, which were unaliened by the heir at the time of the judgment, by which at common law the lands were bound by relation (*e*), from the firſt day of the term in which it was ſigned; though the defendant ſtill continued not only perſonally liable to the extent of the aſſets deſcended, but liable *de bonis propriis* for the whole debt by reaſon of his falſe plea of *reins per deſcent* (13). But where the alienation was returned by the ſheriff, upon the firſt general elegit to have been made by covin, Brook ſeemed to think that not a *teſtatum elegit*, but an *elegit de novo* ſhould iſſue; for in ſuch caſe the defendant ought to be conſidered as ſtill *poſſeſſed* of all the aſſets

(13) Brook, Aſſets *per* Deſcent, 5. 6 Co. 47. 2 Roll. Abr. 70. Sty. 288. *per* Rolle c. 9.

(*e*) Vid. 29 Car. 2. c. 3. ſ. 14, 15. by which the relation of judgments to the firſt day of term is altered with reſpect to *bonâ fide* purchaſers, who are only affected by the judgments of their vendors, from the time of the ſigning ſuch judgments.

deſcended,

deſcended, even at the time of the judgment, ſince his fraudulent alienation was *no* alienation as to creditors. And it ſhould ſeem, that, ſince, wherever the plaintiff by his replication elects to have his remedy by the ſtatute 3 & 4 W. & M. (*f*), he *can* only have judgment for the *value* of the lands deſcended, if he would take advantage of the ſtatute 13 Eliz. c. 5. againſt a fraudulent alienation by the heir to a confederate purchaſer, he would do better to reply *as at common law*, in order that upon the *general* judgment the *deſcended lands themſelves might* be extended in the hands of the alienee as being *ſtill in the poſſeſſion of the heir as to the demands of creditors*, and then the covin (*g*), might be tried in an action againſt the ſheriff by the purchaſer, or if the ſheriff returned the alienation by the heir, he would be liable to an action for a falſe

(*f*) The ſtatute gives no occaſion to alter any more of the form of the replication which was before uſed, than merely as to the time when the aſſets deſcended, vid. *Redſhaw* v. *Heſter*, Carth. 353. 5 Mod. 122. S. C.

(*g*) But there is evident riſk in relying upon the covin, for if the plaintiff waives the benefit of the ſtatute, he is anſwered at common law by an alienation *bonâ fide* before the ſuit commenced.

return, which would bring the queſtion of fraud before a jury (*b*).

(*b*) In equity, where an heir liable upon the bond of his anceſtor, before any ſuit commenced upon the bond, conveyed away the eſtate to a purchaſer, it was doubted whether, upon a bill brought againſt the heir for a diſcovery of aſſets, and to ſubject money raiſed by the ſale, relief ought to be granted; but upon the heir's pleading alienation before the original filed, the Lord Keeper ordered him to anſwer, ſaving the benefit of his plea to a hearing, vide *Goffe* v. *Whalley*, 1 Vern. 282. In *Sagittary* v. *Hide*, where the heir ſold the lands to a purchaſer before any ſuit commenced, though the purchaſer had notice of the bond, the court would not treat part of the purchaſe money which remained in the hands of the purchaſer not yet paid over as aſſets to ſatisfy the plaintiff, who was a bond creditor of the anceſtor. But where there has appeared to be colluſion between an *executor* and a purchaſer, the court of chancery has followed the aſſets ſpecifically; as in *Crane* v. *Drake*, 2 Vern. 616. where, there being expreſs notice of a debt of the teſtator ſtill unſatisfied, and a contrivance between the purchaſer and executor to defeat ſuch claim, Lord Chancellor Cowper ſaid, that the purchaſer was a party to and contriving a *devaſtavit*, and affirmed the decree at the Rolls for the plaintiff. But in *Nugent* v. *Gifford*, 1 Atk. 463. where the purchaſer from the executor was not chargeable with any notice or colluſion, the court would not diſturb his enjoyment. And it ſeems according to *Paget* v. *Hoſkins*, Gilb. Eq. Rep. 111. that wherever an executor or adminiſtrator

miniſtrator diſpoſes of the aſſets without valuable conſideration, there the creditors, or whoever is entitled under the ſtatute of diſtributions, may purſue the aſſets in equity, for the diſpoſition is fraudulent within the principle and policy of the 13 Eliz. and they are ſtill to be regarded as if they were in the hands of the perſonal repreſentative. But if they are ſold *bonâ fide* and for *valuable conſideration*, they ſhall not be followed, becauſe it is the province and duty of the executor to make the moſt of the aſſets, and nobody would buy if a purchaſer *bonâ fide* were ſubject to the demands of creditors. And general notice that the goods or chattels are teſtamentary property is of no prejudice to the purchaſer's title, vid. *Ewer* v. *Corbett*, 2 P. Wms. 149. In addition to this claſs of beneficial determinations, by which the protecting aid of a court of equity has erected a barrier againſt colluſive dealings between purchaſers and executors or adminiſtrators, it may be uſeful to direct the reader's attention to the caſe of *Doran* v. *Simpſon*, very lately decided in chancery, vide 4 Vez. jun. 651. whereby it appears that "where *creditors*, or *next of kin*, can ſtate a caſe, that the repreſentative is colluding with the *debtors* of the eſtate, and diminiſhing the fund, they have a right upon that ground of colluſion to make the debtor a party to obtain a diſcovery, and upon that diſcovery to attach upon the money, and to prevent the payment of the money, or a ſettlement of the account, by colluſion between the repreſentative and the debtor."

CHAPTER VI.

SECTION I.

NOTHING has yet been ſaid reſpecting that clauſe of the ſtatute 27 Eliz. c. 4. which reſpects *fraudulent powers of revocation*. The preſent chapter is therefore aſſigned to that ſubject. But it may be an aſſiſtance to the reader to lay before him the words of that clauſe, which ſeem ſometimes to have been interpreted with a miſconception of the meaning of the legiſlature. "And be it further enacted by the authority aforeſaid, That if any perſon or perſons have heretofore ſithence the begining of the queen's majeſty's reign that now is, made, or hereafter ſhall make any conveyance, gift, grant, demiſe, charge, limitation of uſe or uſes, or aſſurance of, in or out of any lands, tenements, or hereditaments, with any clauſe, proviſion, article or condition of revocation, determina-

tion or alteration, at his or their will or pleaſure, of ſuch conveyance, aſſurance, grants, limitations of uſes or eſtates of, in or out of the ſaid lands, tenements, or hereditaments, or of, in or out of any part or parcel of them, contained or mentioned in any writing, deed or indenture of ſuch aſſurance, conveyance, grant, or gift; and after ſuch conveyance, grant, gift, demiſe, charge, limitation of uſes or aſſurance ſo made or had, ſhall or do bargain, ſell, demiſe, grant, convey or charge, the ſame lands, tenements or hereditaments, or any part or parcel thereof, to any *perſon or* perſons, bodies politick and corporate, for money or other good conſideration paid or or given (the ſaid firſt conveyance, aſſurance, gift, grant, demiſe, charge, or limitation, not by him or them revoked, made void or altered, according to the power and authority reſerved or expreſſed unto him or them in and by the ſaid ſecret conveyance, aſſurance, gift or grant), That then the ſaid former conveyance, aſſurance, gift, demiſe, and grant, as touching the ſaid lands, tenements, and hereditaments,

ſo

ſo after bargained, ſold, conveyed, demiſed, or charged, againſt the ſaid bargainees, vendees, leſſees, grantees, and every of them, their heirs, ſucceſſors, executors, adminiſtrators and aſſigns, and againſt all and every perſon and perſons which have, ſhall or may lawfully claim any thing, by, from or under them or any of them, ſhall be deemed, taken and adjudged to be void, fruſtrate, and of none effect, by virtue and force of this preſent act."

From what has been produced in an early part of this treatiſe the reader may think it pretty manifeſt that courts of law and equity have generally agreed in holding the *voluntarineſs* of a conveyance, excluſive of the operation of this fifth ſection of the act, ſtrong preſumptive evidence *at leaſt* of the fraudulent intent within the meaning of the 27 Eliz., though he be diſinclined to a full acquieſcence in the opinion of a great judge, (*a*) who has ſaid that every voluntary

(*a*) 2 Vez. 10. by Lord Hardwicke; read alſo his Lordſhip's opinion to the ſame effect in *White* v. *Sanſom*, 3 Atk. 412. and in *Bennet* v. *Muſgrove*, 2 Vez. 57.

conveyance, followed by a ſubſequent conveyance for valuable conſideration, though there be *no fraud* in that voluntary conveyance, yet, according to the determinations, ſuch mere voluntary conveyance is *void at law*, by the ſubſequent purchaſe for valuable conſideration. In conſiſtency with this prevailing conſtruction, a ſubſtantive and independent operation has been implicitly or expreſsly allowed to this part of the ſtatute, which having declared by a diſtinct clauſe, and in direct terms, that the bare inſertion of a power of revoking (*b*) at pleaſure in a *conveyance*

(*b*) No conveyance at common law could have a power of revocation annexed to it: it was a repugnance which the common law would not endure. But a man might have annexed a condition to his feoffment, that if he tendered 12 *d.* to the feoffee or his heirs, he might enter again upon the eſtate; ſo that the eſtate which was diveſted out of him by livery of ſeizin, might be reveſted in him upon the performance of the condition and *re-entry*. A common law conveyance with a power of revocation was void, as to all power of revocation, for repugnancy, and becauſe a double power could not be ſeated in diſtinct perſons over the ſame thing. Theſe powers of revocation came in with the *ſtatute of uſes*; at

ance ſhall render it void and of no effect againſt a purchaſer for valuable conſideration, has ſet up a definitive mark of fraud ſuperſeding, wherever it is found, all inference by general collection. Thus it was ſaid by Winch Juſtice in the caſe of *Tyrer* v. *Littleton* (1), that "if it be a fraud within the ſtatute 27 Eliz. *appa-*

(1) 2 Brownl. 190.

---

at leaſt a legal power of revoking a legal conveyance; for by the ſtatute 27 H. 8. c. 10. all thoſe conveyances by way of uſes, which carried only the equitable eſtate at common law, were converted into regular legal conveyances, ſo that, after this ſtatute theſe powers remaining as they were, it became poſſible to convey a legal eſtate, and reſerve a legal power of revoking the conveyance.

But it was obſerved by Baron Powell in *Bath* and *Montague*'s caſe, that a ſimple power of revocation was as repugnant to a conveyance after the ſtatute as it was before; but a power of revocation was let in to work as a *condition*, with this difference, that whereas the performance of a condition at common law would not work a reveſting of the eſtate without a *re-entry*, after the ſtatute of uſes the performance or execution of the power transferred the eſtate to the new uſes, or in other words, reveſted the eſtate in him that had the power, without *re-entry*. But ſtill there is a neceſſity for the power's being conformably executed, as much as there was of the condition's being performed at common law, for it is ſtill in the *nature* of a condition. Vide *Inglefield*'s caſe, 7 Rep. 39. Co. Litt. 237. a.

rent, that is, if it contain a power of revocation, which is declared to be *apparent fraud* by the ſtatute, the court may take notice of that without any *averment*." And it ſhould be obſerved, that, notwithſtanding ſome notions to the contrary, the introduction of ſuch a power into a ſettlement or conveyance, operates by *vitiating* the inſtrument as to a ſubſequent purchaſer, to the extent of the dominion reſerved by ſuch power, and not by any ſuppoſed ſtatutory execution of the power itſelf in favour of ſuch purchaſer; for, as before has been obſerved, there would be a great inconſiſtency in making the reſervation of ſuch power at once the *fraudulent act*, and the *inſtrument* by which the fraudulent act is defeated. The propriety of the conſtruction here contended for is ſupported by the reaſoning of the whole court in the caſe of *Bullock* v *Thorne* (2), where, between the firſt conveyance containing the power of revocation and the ſale to the purchaſer, the ſeller made a leaſe for years, and afterwards levied a fine to corroborate the leſſee's intereſt, by which it was contended the power

(2) Moore 616.

power was extinguiſhed; whence the counſel proceeded to infer that the vendor had no power to revoke at the time of the ſale; and according to him, the operation of this clauſe of the ſtatute was meant to be confined to caſes where the vendor *had power* to revoke, and did *not* revoke; for, it was ſaid, the ſtatute made the conveyance *void* which *ought* to have been revoked, and ſupplied the duty of the party himſelf who ought to have revoked, and neglected ſo to do; but if the party was *unable* to revoke, there the ſtatute had no means of avoiding the conveyance, becauſe the party could not avoid it himſelf.

But the whole court rejected this reaſoning (*c*), which ſeemed to them to be contrary to the *words* and *intention* of

(*c*) The court argued *hypothetically* on the ſuppoſition that the fine levied by way of aſſuring the leaſe operated the extinction of the power. But as to the point itſelf, they were agreed, that, if a man having a power to revoke an uſe, make a leaſe for years, and levy a fine only as a further aſſurance of the term, without expreſſing any uſe, the power is only ſuſpended during the term, and not extinguiſhed. Vid. Moore 618.

the

the ſtatute, and they recited the *words* to the following effect, "where any perſon makes a conveyance, &c. with any clauſe of revocation at his pleaſure *mentioned* in the deed of conveyance, and afterwards bargains and ſells, &c. the land for money, &c. the ſaid conveyance not being revoked according to the power, &c. there the firſt conveyance ſhall be void againſt the purchaſer;" and they ſaid that if the caſe in queſtion were examined by the letter of the ſtatute it would be found to fall within it, in three particulars, viz. there was a power of conveyance *mentioned in the* deed; the conveyance was not revoked according to the power; the perſon making the conveyance afterwards bargained and ſold the land to a purchaſer for valuable conſideration.

And they obſerved, that where theſe *premiſes* occurred, the ſtatute drew the *concluſion*, viz. that the conveyance ſhould be *void as againſt* the purchaſer. And they thought that the extinction of ſuch power of revocation before the ſale, did not at all affect the operation of the ſtatute, for they ſaid that although when the power is

determined it is impoſſible for the conveyance to be revoked according to the power, yet that the ſtatute makes the conveyance *void* againſt the purchaſer; for the ſtatute ſays, that if a man make a conveyance, with power of revocation, and then ſell the land for money, the conveyance not being revoked according to the power, the conveyance ſhall be *void*; and that to conſtrue the ſtatute as making the conveyance good againſt the purchaſer, becauſe the power of revocation was extinct, would be to make it an encouragement and aſſiſtance to fraud; for that then a vendor might make a ſecret releaſe of his power, or a ſecret feoffment, and might ſtill be able to ſhew to the purchaſer the conveyance containing the power of revocation, as an inducement to him to complete his purchaſe: for which reaſons it appeared to the court that if the power of revocation be *mentioned* in the deed of conveyance, whether the power be put an end to or not by any intermediate act, the conveyance will nevertheleſs be *void* as againſt the purchaſer.

In

In the ſame caſe Walmeſley Juſtice held it clear that a leaſe for years made by one who has power of revocation, does not ſuſpend the power if created *by way of uſe*, but he may execute it as to the reverſion expectant upon the term, though it was otherwiſe with reſpect to a *condition* annexed to *an eſtate in poſſeſſion.* So that, applying that doctrine to the principal caſe, the leaſe there made by the feller before his conveyance to the purchaſer was no hindrance to the execution of the power as to the reverſion. And he cited a caſe, which had been adjudged ſince the ſtatute 27 Eliz. c. 4. in the King's Bench in the time of Wray C. J. where, a man having made a conveyance with a power of revocation to be executed *at a day to come*, and before the arrival of the day having conveyed the land to a purchaſer, the firſt conveyance was adjudged void; and the reaſon was, that although *at the time of the purchaſe* the vendor had no power to revoke, yet there was a power of revocation *mentioned* in the firſt conveyance. But he added, that the conveyance ſhould not be void againſt the purchaſer *before* the time

time limited for the revocation, but *after* that time it ſhould be *utterly void*, becauſe it was ſubject to be revoked from that time.

The ſenſe of the court appears clearly from the tenour of the argument, as above ſtated, to have been, that the *inſertion* of ſuch a power of voluntary revocation, makes the deed *ipſo facto* void againſt a ſubſequent purchaſer, without any ſuppoſed ſtatutory execution of the power; and that in fact the whole deed, power and all, is *void* as againſt a purchaſer for value, by reaſon of the fraudulent reſervation; and though it was ſaid by Walmeſley, and admitted by Anderſon and Kingſmill, that a deed containing a power of revocation reſerved to be executed at a *future day*, could only be avoided by a ſubſequent ſale from the day when the power was exerciſeable, which may look a little at firſt like an intimation that the power was to be *inſtrumentally* efficacious in the deſtruction of the intereſt raiſed by the firſt conveyance, yet, upon conſidering the matter more attentively, we obſerve, that at the time of the ſecond conveyance, when the power, accord-

according to ſuch a doctrine, muſt have received its proſpective execution, it was neither *in eſſe* nor in capacity to be executed. But the truth ſeems to be, that the defeaſance of a conveyance, as againſt a ſubſequent purchaſer, produced by the 5th ſection of the 27 Eliz. can only co-extend with the dominion of the power; and there is nothing in ſuch a ſuſpended power to prove that the conveyance may not have been for valuable conſideration up to the period when it was to become revocable at the pleaſure of the grantor. But though, in the caſe of ſuch future power *of revocation*, the preſumption of fraud dates only from the moment in which the conveyance becomes revocable, yet the ſtatute, which does not work by the inſtrumentality of the power, enables a purchaſer from the grantor, *before* the power is in capacity to be executed (*d*), to avoid the

(*d*) The *original* ſuſpenſion of a power reſerved to be executed on a day to come is very diſtinguiſhable from the ſuſpenſion of what was originally a preſent power ariſing *ex poſt facto* by the ſubſequent creation of a term of years by the party to whom the power was reſerved, and

the prior conveyance containing ſuch power, from the period of its practical exiſtence. Such ſeems to be the extent of the avoidance conſequent upon the inſertion of a voluntary power of revocation in a conveyance by virtue of the 5th ſection of the act 27 Eliz. but there can be no doubt but that, where the immediate intereſt conveyed until the future power is limited to ariſe is merely voluntary, or where the future power is contained in a conveyance moving *wholly* upon gratuitous conſiderations, the ſubſequent purchaſer for value avoids the *entire* conveyance.

If, by way of following up the application of theſe principles, we ſuppoſe a man ſeized of land in fee ſimple to make a feoffment to the uſe of A. B. for twenty-one years, reſerving rent, and afterwards

---

and which is nothing but a partial execution of the power. Vid. Moore 612, 613, 614. In the caſe laſt ſuppoſed, the grantor may preſently exerciſe this power over the reverſion expectant upon the particular intereſt previouſly ſet up by him; and there the *operation* merely, and not the *execution* of the power, is ſuſpended. In the firſt caſe, the power is not *practically* exiſting even in proſpective intereſt before its appointed time arrives.

to

to the uſe of C. in tail, with remainder over, with power in the grantor to revoke, at the expiration of the leaſe, all the ſucceeding uſes, and afterwards, while A. B. is in poſſeſſion of the land, to enter with his conſent (3), and enfeoff a third perſon with livery of ſeizin for a valuable conſideration given; it ſeems clear that the ſecond feoffment would not operate under the ſtatute as an execution of the power, for the truth is, that it would work an *extinction* of the power, according to *Albany*'s caſe (4); and ſo far from operating by *force* of the power, the power or future uſe would be carried away *inclu-ſively* (5) in the livery; for ſuch future power is only a right of an uſe, and all rights and uſes are ſwept away together by the feoffment. But ſuch ſecond feoffment would ſtill prevail againſt the former feoffment by virtue of the 5th ſection of the ſtatute 27 Eliz. and it could only prevail in the ſame manner as a ſubſequent conveyance for value *bonâ fide* prevails, by virtue of the *firſt* clauſe of the ſtatute, againſt a prior voluntary and fraudulent conveyance, *i. e. mutatis mutandis*, by a *radical*

(3) Vid. Co. Litt. 48.b. et vid. note 318. by Harg. and Butl. Hal. MSS.

(4) 1 Rep. 112. a. and b.

(5) Vid. Plowd. Com. 352. 4 Leon. 221. 2 Roll. Rep. 323.

radical avoidance from the time when the former conveyance was ſubjected to the power. But if the ſecond feoffment were made without valuable conſideration, ſuch ſecond feoffment would have been *tortious* as to the intereſts under the firſt, at the ſame time that it would have enured to the extinction of the future power of revocation in the feoffor; and if after ſuch ſecond feoffment the feoffor were to convey for valuable conſideration, the 5th ſection of the ſtatute under diſcuſſion would enable the valuable purchaſer to ſupplant all the former intereſts, except the leaſe for years, leaving the ſecond feoffment good as an extinction of the power of revocation, but avoiding its effect as far as it might have enured to the corroboration of the firſt. And if the leaſe be ſuppoſed out of the caſe, the ſubſequent conveyance to the purchaſer would carry the whole eſtate in the land, diſcharged of the power of revocation. Thus it was ſaid to be reſolved in *Twyne*'s caſe that if a man have a power of revocation, and afterwards, to the intent to defraud a purchaſer, levy a fine, or make a feoffment or other con-

veyance to a ſtranger by which he extinguiſhes his power, and afterwards bargain and ſell the land to another for valuable conſideration, the bargainee ſhall enjoy the land, for as to him the fine, feoffment, or other conveyance by which the condition was extinct was void by the ſaid act; and ſo the firſt clauſe, by which all covinous and fraudulent conveyances are made void as to purchaſers, extends to the laſt clauſe of the ſame act, when he who makes the bargain and ſale had a power of revocation; and it was ſaid in the ſame caſe, that the ſtatute has put voluntary eſtates, *with power* of revocation, as to purchaſers, on the ſame footing with eſtates made by fraud and covin to deceive purchaſers.

(6) Cro. Jac. 180.

It muſt be owned that in the caſe of *Croſs* v. *Fauſtenditch* (6), it ſeems to have been intimated as the opinion of the court, that the 5th ſection of the ſtatute in queſtion executed the power of revocation in favour of the purchaſer; but it is to be obſerved that the clauſe of the ſtatute was there recited thus, *viz.* "that if one makes a conveyance with clauſe of revocation,

tion, and afterwards for conſideration of money, or *for other conſiderations*, bargains and ſells, demiſes or grants the land to a ſtranger, the ſaid conveyance ſhall be void and *revoked*." If the clauſe aforeſaid was thus found by the jury, they found what nobody elſe can find in the ſtatute. But it is enough for our preſent purpoſe to remark, that inſtead of the words "ſhall be void and revoked," the ſtatute uſes the words following: "ſhall be adjudged to be *void, fruſtrate, and of none effect*." The caſe afterwards ſtates the queſtion to be, "whether this voluntary and revocable conveyance ſhall be ſaid to be void and *revoked quoad* the leſſee." But one cannot help obſerving, that though it is of little conſequence to the intereſt of the purchaſer, ſo as he gets the better of the firſt conveyance, in what manner the deſtruction is wrought, yet it imports much to general analogy and conſiſtency of principle, that the different legal modes by which an identity of effect is produced, ſhould be carefully diſtinguiſhed; and it is one thing to ſay, that the ſtatute deſtroys the conveyance by *virtue* of a power of revocation contained in it,

and another, that it renders it *ipso facto* void againſt a ſubſequent purchaſer by *reaſon* of ſuch power's being *mentioned* and *contained* in it.

We obſerve too, that the conveyance in the above caſe of *Croſs* v. *Fauſtenditch* was voluntary throughout, ſo that it was fundamentally void againſt a purchaſer upon the general conſtruction of the ſtatute. And that though the voluntary grantor, when he afterwards made the leaſe, which was the valuable intereſt protected by the ſtatute, had an eſtate for life, out of which the leaſe *might* have been derived; yet the ſtatute, which *makes no uſe of any part of the fraudulent conveyance*, was conſtrued to forbid ſuch a conſtruction, by *radically* ſubverting the former voluntary conveyance *quoad* the intereſt to be protected, and by reinſtating the voluntary grantor in his old fee ſimple *as to the leſſee*, who derived in paramountcy over all the eſtates created by ſuch conveyance.

SECTION II.

We are to obſerve, that the clauſe of the ſtatute in queſtion, whereby a conveyance, with power of revocation at the pleaſure of the grantor, is made void as againſt a ſubſequent purchaſer, is followed by a proviſo, by which it is declared, that "no lawful *mortgage* made or to be made *bonâ fide*, and without fraud or covin, upon good conſideration, ſhall be impeached or impaired by force of the ſaid act, but ſhall ſtand in the like force and effect as the ſame ſhould have done, if the ſaid act had never been had or made." By virtue of which proviſo, ſome powers of revocation, though reſerved to be executed at the *pleaſure* of the grantor, may yet be valid and ſuſtainable againſt ſubſequent purchaſers for valuable conſideration. And the caſes are clearly diſtinguiſhable in reaſon, for if the dominion reſerved be made to depend upon a condition precedent, for the

formance of which the whole conveyance is evidently deſigned as a coercive ſecurity, the tranſaction has a notorious meaning and character which repels any charge of fraud or inconſiſtency. Thus, in the caſe of *Griffin* v. *Stanhope* (1), where the huſband, in purſuance of a promiſe before marriage, made a leaſe to ſome friends of his wife to her uſe, for a term of years, if ſhe ſhould ſo long live, to commence after his death, with an indorſement expreſſing the intent thereof to be, that when there ſhould be a jointure of 100*l.* *per annum* ſettled upon her according to *the agreement*, then the leaſe ſhould be void, though this leaſe was to determine *at the will* of the baron, yet the court held that it could not be ſhaken by a ſubſequent purchaſer; and they adverted to the diſtinction between a leaſe made with a proviſo, that if the leſſor pay *ten ſhillings*, the leaſe ſhould be void, which was clearly only a nominal condition, (the intent of ſuch a deed being ſubſtantially to reſerve a dominion over the eſtate, notwithſtanding the conveyance), and a leaſe by a way of *mortgage* with a proviſo, that if 1,000*l.* be

(1) Cro. Jac. 455.

be paid on ſuch a day, that then the term ſhall ceaſe.

It has been holden, too, that a power to charge a *particular* ſum reſerved by the grantor of an eſtate, ſhall not be conſtrued fraudulent within this ſtatute. Thus in the caſe of *Jenkins* v. *Keymiſhe* (2), where the father and ſettler upon his ſon's marriage reſerved a power to himſelf, by deed in writing, to charge the ſettled lands with the payment of 2,000*l.*, Lord Hale and the reſt of the court held that "this proviſo for charging with 2,000 *l.* was not a power within the words of the ſtatute (it being a particular ſum) to revoke, determine, or alter the eſtate." But though a conveyance do not, in terms, contain a power of revoking, determining, or altering the eſtate conveyed, in the words of the ſtatute, yet, it may virtually come within the clauſe under diſcuſſion, if it contain a power of ſo indefinite an import and extent as to be tantamount in its operation to an *expreſs* power of revocation. Such was the power reſerved by the ſettler in the caſe of *Lavender* v. *Blackſtone* (3), which was to make leaſes

(2) 1 Lev. 150.

(3) 2 Lev. 146

of all or any part of the lands for any number of years, with or without any rent: this was, in effect, a power of defeating, at his pleaſure, the whole ſettlement which had been made of thoſe lands. And in a ſubſequent caſe (4), where W. M. made a conveyance to B. and others, of his eſtate to the uſe of himſelf for life, with power to mortgage ſuch part of the eſtate as he ſhould think fit, and for *what ſums* he ſhould think fit (*a*), the court held that ſuch power amounted in effect to a power of revocation, and was, therefore, fraudulent as againſt creditors *by ſtatute* and judgment.

(4) 2 Vern. 510. *Turback* v. *Marbury.*

(*a*) This, though not ſtated in the caſe, ſeems clearly implied in the judgment.

SECTION III.

IT is very deſerving of obſervation, that in the above-mentioned caſe of *Lavender* v. *Blackſtone*, the power was reſtrained to be executed only with the conſent of the truſtees; a circumſtance appearing at firſt view to take the power out of the reaſon of the ſtatute 27 Eliz. as not being dependent upon the will or pleaſure of the grantor. But it appears from the caſe, that the truſtees were perſons of the grantor's own voluntary nomination; and, therefore, we may conclude, were interpoſed not with any view to a real reſtraint upon the grantor, but merely to colour the tranſaction. The diſtinction as to this queſtion upon the ſtatute, between the caſes where the neceſſity for ſuch conſent operates as a real cheque to the power, and where it is interpoſed by way of ſkreening a real power of voluntary revocation, ſeems to be adverted to in that paſſage in *Twyne's*

(1) 3 Rep. 82 b. caſe (1), wherein Lord Coke obſerves, that "if A. reſerve to himſelf a power of revocation, with the aſſent of B., and afterwards bargain and ſell the lands to another, the bargain and ſale is good, and within the remedy of the act, for otherwiſe the good proviſion of the act by a ſmall addition and evil intention would be defeated." The conſent of a near relation was probably there underſtood (*a*), which was one of the points in the caſe of *Lavender* v. *Blackſtone* (*b*), as we find it reported in (2) 3 Keb. 826. *Keble* (2). Thus alſo Bramſton C. J. is ſaid (3) to have maintained upon this clauſe *of the* (3) Vid. 3 Keb. 752. ſtat. 27 Eliz. the diſtinction between a mere ſhift by introducing other names as conſenting parties to the execution of ſuch power, and the neceſſity for the aſſent of third perſons veritably interpoſed to pre-

(*a*) In *Buller* v. *Waterhouſe* Lord Coke ſeems to have been underſtood by the court to have had this meaning. But in Lane 22. the Barons appear to have underſtood him otherwiſe.

(*b*) As the caſe of *Standen* v. *Bullock* is reported in Keble, it does not appear that there was more than a ſingle truſtee, who was the father-in-law of the perſon to whom the power was reſerved.

vent

rent the execution of the power without valuable conſideration. Where this ſort of conſent has been made neceſſary, the power, though co-extenſive with the ſettlement, has been adjudged to be out of the words and meaning of the ſtatute 27 Eliz. c. 5. ſect. 5. This appears from the caſe of *Buller* v. *Waterhouſe* (4) which was to this effect. Sir J. M. and his wife, in right of the wife, were ſeiſed in fee of the rectory of Bradford, and in conſideration of the marriage of John their ſon, and of 5,000 *l.* portion paid with the intended wife, covenanted with Sir J. L. and three others, relations of the intended wife, to levy a fine (which was accordingly levied) of the ſaid rectory (amongſt other things) to the uſe of Sir J. M. for life, remainder to his wife for life, remainder to John their ſon and his heirs, provided that it ſhould be lawful for Sir John or his wife to revoke the uſes, with the conſent of the ſaid four perſons, or the ſurvivors or ſurvivor of them, or of the executors or adminiſtrators of the ſurvivor, teſtified under their hands and ſeals. Sir J. M. died, and his wife entered and ſold the ſaid rectory for 400 *l.* paid, and 1,000 *l.*

(4) Sir Thomas Jones 94.

ſecured by a mortgage of the ſaid rectory; which ſale and conveyance were made without the conſent of the ſurvivor of the truſtees, who had been named on the part of the ſon and his wife, and for the preſervation of their eſtate. It was found by the jury, in their ſpecial verdict, that the whole conſideration extended as well to the rectory, as to all the other lands. And it was argued by Pollexfen, and agreed by the court, that the words in the ſaid clauſe of the act, *at their will and pleaſure*, were to be interpreted, *at their choice, liberty, and election*, i. e. *without the reſtraint of any perſon*; but that in the caſe before them the will and pleaſure of the *party* was made to depend upon the will and pleaſure of *others*.

And as to the caſe of *Standen* v. *Bullock* it was ſaid, that there the conſent reſtraining the power ſeemed to be lodged in a perſon who was at the devotion of the maker (*c*), and appointed by him; but

(*c*) Nothing of this appears in the caſe as it is reported in Moore, under the name of *Bullock* v. *Thorne*. Vid. Moore 615.

that,

that, in the principal caſe, the conſent was placed in perſons intruſted for the wife; ſo that the conveyance was not ſubject to the will and pleaſure of the makers, according to the expreſſion of the ſtatute.

A modern writer has obſerved (6), that "he had not met with any caſe which went ſo far as to ſay, that a mere voluntary conveyance, with power of revocation reſerved, but reſtrained to be executed with the conſent of third perſons, was not within the equity of the ſtatute 27 Eliz.; that in the caſe of *Buller* v. *Waterhouſe* that point was conſidered, but did not ſeem to have been ſettled, becauſe all the claimants under the conveyance were purchaſers for valuable conſideration." It ſhould ſeem, however, very inconſonant to the true reading of this ſtatute, to ſuppoſe that theſe powers of revocation can in any ſhape, have a converſatory effect upon its operation. They may work to the deſtruction of a conveyance unleſs they fall within ſome of thoſe exceptions above

(6) Mr. Powell's Eſſay on Powers, 329.

above conſidered, but we can never rightly infer that thoſe ſaving circumſtances which repel from theſe powers the imputation of fraud can convert them into poſitive proof of honeſty of intention, or that becauſe they are not the *diſorder* they muſt neceſſarily be the *cure*. The truth ſeems to be, that whether a power of revocation be evidence or not of the fraudulent intent within the ſtatute muſt depend upon its own characteriſtic circumſtances; but that, if a conveyance *merely* voluntary, or accompanied with other badges of fraud, contain a power of revocation conceived in ſuch terms as have been holden to take it ſubſtantively out of the meaning of the particular clauſe of the ſtatute relating to fraudulent powers of revocation, yet, upon the general conſtruction of the ſtatute, the other indications of fraudulent intent will have their accuſtomed effect in avoiding the alienation or gift againſt a ſubſequent purchaſer for valuable conſideration. On the other hand it clearly appears by *Buller* v. *Waterhouſe* above cited, (and it ſeems to have been the true point in queſtion in that

that caſe), that even the valuable conſideration of marriage will not ſuſtain a conveyance againſt a ſubſequent valuable purchaſer, if it contain ſuch a voluntary power of revocation as falls clearly within the meaning of the above-mentioned clauſe of the ſtatute. For, had the valuable conſideration of matrimony been ſufficient to heal the effect of ſuch fraudulent power, there would have been no neceſſity for going into the queſtion as to the character of the power contained in the ſettlement under diſcuſſion in the caſe above mentioned. And there could have been no foundation for the doubt ſtated in the opinion of Mr. Booth, publiſhed at the end of the laſt edition of the Touchſtone, whether the reſerving of a power to the grantor or original owner of the land, though chequed by requiring the conſent of the truſtees, does not make a ſettlement upon marriage (*d*) fraudulent within the ſtatute 27 Eliz. c. 4. But in the caſe of *St. Saviour's* in Southwark reported in Lane (6), (6) Lane 22.

(*d*) For ſuch ſeems clearly to have been the ſort of ſettlement adverted to by Mr. Booth.

in

in which caſe it appears that the ſtatute came very generally under conſideration, it was holden by the Barons, of whom Tanfield was the Chief, that though the conſideration of marriage be a good conſideration, yet if a power of revocation be annexed to it, it is void as to ſtrangers.

CHAPTER VII.

SECTION I.

BUT the word Strangers, with which the foregoing Chapter was cloſed, muſt be confined to ſuch *only* as come in upon valuable conſideration; for as to other perſons, though the grantor may have enabled himſelf to make a freſh grant to a volunteer, by an expreſs reſervation of a power to that effect, yet it is plain that ſuch ſubſequent conveyance can only operate by virtue of the ſpecial dominion retained by the grantor, and not by any conſtructive avoidance under the ſtatute of 27 Eliz. For voluntary conveyances were always binding upon the party, and all claiming voluntarily under him; and the ſtatutes of Elizabeth againſt fraudulent conveyances have expreſsly guarded againſt a conſtruction in derogation of this rule. Thus in the 13th Eliz. it is provided, that the fraudulent gifts and grants there denounced ſhall be void *only* againſt that perſon or thoſe per-

ſons, his or their heirs, ſucceſſors, executors, adminiſtrators, and aſſigns, whoſe actions, ſuits, debts, accounts, &c. And in the 27th Eliz. it was with ſimilar caution provided that the fraudulent conveyances in the contemplation of that act ſhould be void *only* as againſt thoſe who ſhould thereafter purchaſe upon *good, i. e.* valuable conſideration. Thus was the ſtatute 13 Eliz. underſtood in the caſe of *Hawes* v. *Leader* (1), which was ſhortly as follows: A. dying inteſtate, after having granted to B. for a conſideration of 20 *l.* all his goods mentioned in a ſchedule, by a deed, containing a covenant that the grantor, his adminiſtrator, &c. ſhould quietly deliver them to B. and having bound himſelf in 40 *l.* to the performance of that covenant, B. demanded the goods of the adminiſtrator, who refuſed to deliver them; whereupon B. brought his action againſt the adminiſtrator, and in his declaration ſhewed in ſpecie the goods contained in the ſchedule. The defendant pleaded the ſtatute 13 Eliz. c. 5. and that the inteſtate was indebted to divers perſons in ſeveral ſums (naming the perſons

(1) Cro. Jac. 270.

and ſpecifying the ſums) to the amount of 100 *l.* and being ſo indebted, on &c. made the deed in queſtion, being a grant of the goods, to the value of 80 *l.* and no more; and further, that the ſaid deed was made by *fraud* and *covin* between the inteſtate and the plaintiff, to deceive his creditors; and that the inteſtate, notwithſtanding the deed of gift, uſed and occupied all the goods during his life. The plaintiff replies, that the defendant had aſſets in his hands to ſatisfy the debts demanded, and that the deed of gift was made upon good conſideration; whereupon iſſue was joined, and at Huntingdon aſſizes Cook C. J. refuſed to try the cauſe, becauſe the iſſue was not well joined, and a repleader was ordered; upon which the defendant pleaded as before, and the plaintiff demurred. Judgment was given for the plaintiff, becauſe, among other reaſons ſhewn for the demurrer, it was inſiſted that the defendant was not a perſon enabled by the ſtatute 13 Eliz. c. 5. to plead as he had done; for that the ſtatute had made the deed void as againſt the *creditors*; but not as againſt the *party* himſelf,

ſelf, his *executors*, or *adminiſtrators*, and againſt *them* it remained a good deed (*a*).

This rule of conſtruction does not confine itſelf to theſe ſtatutes of Elizabeth, but is applicable to moſt of the inſtances wherein conveyances have been made fraudulent by ſtatute; thus, fraudulent conveyances by tenants in dower, or alienations by jointreſſes upon the ſtatute 11 Hen. 7. have always been held good againſt the party making them, though invalid as againſt the intereſt attempted to be injured (2), which attribute of a conveyance, to be void as againſt one perſon, and valid as to another, was ſaid by Lord Hobart to be one of the commoneſt caſes of the law (3). But in *Packman*'s caſe (4) this doctrine of partial relief upon the ſtatute 13 Eliz. c. 5. was carried a ſtep further, for a caſe was there put, wherein the

(2) Hob. 166.

(3) Id. ib.
(4) 6 Rep. 18.

(*a*) And ſuch voluntary deeds have been held availing to the purpoſe of working a forfeiture or breach of a bond ſtatute or covenant, though void within the ſtatutes of fraudulent conveyances. Vid. the caſe of *Green* v. *Roll*, Cro. Jac. 131, 132. and *Beverley* v. *Galacy*, 2 Roll. Rep. 305.

party

party injured, though he did not claim *under* the party making the fraudulent conveyance, was conſidered as not coming within the *protection* of the ſtatute. The caſe was thus: A man died inteſtate, and the ordinary committed adminiſtration to a ſtranger; after which the next of kin of the inteſtate took out a citation in the ſpiritual court to have the adminiſtration, which had been granted, repealed; pending which ſuit, the adminiſtrator, to defeat the plaintiff in the ſpiritual court of the effect of his ſuit, ſold the goods of the inteſtate to the defendant; and the letters of adminiſtration being revoked, and adminiſtration being afterwards committed to the plaintiff, he brought an action of trover againſt the defendant for the goods of the inteſtate, which had been conveyed to him by the firſt adminiſtrator. And it was reſolved that the action did not lie; for as the firſt adminiſtrator had, without queſtion, the *property* of the goods in him, he might give them to whom he pleaſed; and, though the letters of adminiſtration were afterwards revoked, yet the gift which had been made was not thereby defeated.

And it was the opinion of the court that even if the gift had been made by *covin*, though it would be void by the ſtatute 13 Eliz. c. 5. againſt a *creditor*, yet it would have remained good againſt the *ſecond adminiſtrator*.

The ſtatute 27 Eliz. c. 4. has the ſame partial operation. The party, and thoſe claiming under him, are as much bound by a voluntary conveyance, as where the moſt valuable conſideration has been given. For that ſtatute has only altered the law in favour of *purchaſers* for *value*, and before the ſtatute, the heir could never ſet up his title againſt the voluntary alienee of his anceſtor, nor even call upon him for a contribution, where both were amenable to the creditors of the anceſtor, as tertenants. Inſomuch, that if a man ſeized of three acres had acknowledged a recognizance or ſtatute, and afterwards enfeoffed A. of one acre, and B. of another, *without any valuable conſideration*, and died, and the third acre had deſcended to the heir; in this caſe, if execution were taken out *only* againſt the *heir*, he could not have

have contribution, for he was conſidered, ſays the book, as coming to the land, without any conſideration, and ſitting in the ſeat of his anceſtor (5).

(5) 3 Rep. 12. b *Sir William Herbert's* caſe; and ſee Moore 169. S. C. and *Gawdy's* caſe there cited.

Courts of Equity have the ſame reſpect for executed voluntary conveyances, where no valuable claims are ſet up in oppoſition to them, and will not aſſiſt the party making them, or his repreſentatives claiming as ſuch in ſetting them aſide. Thus in the caſe of *Hobſon* v. *Staneer* (6) in Chancery, where the plaintiff, after having ſettled his eſtate upon his firſt marriage, with limitations to the brothers of his intended wife in fee preceded only by a proviſion for the wife, without any notice taken of iſſue, had, upon the death of his firſt wife without iſſue, contracted a ſecond marriage, and reſettled his eſtate upon ſuch ſecond marriage in conſideration of a portion paid, and afterwards *himſelf* brought a bill to ſet aſide the firſt and eſtabliſh the ſecond ſettlement, the court refuſed the relief prayed, as no fraud or circumvention was proved in the caſe, or any mental incapacity in the ſettler to raiſe

(6) 9 Mod. &c.

a ſuſpicion of improper controul; and it was ſaid by the court, that the plaintiff was not the *party to complain.* And though an executed conveyance to a purchaſer for valuable conſideration vacates, as has been ſufficiently ſhewn, an anteriour voluntary conveyance, yet if a man, after making a voluntary diſpoſition of his property, manifeſts by ſome collateral act his intention to defeat his firſt conveyance, it ſeems, that in ſome caſes, there may be ground for an application to Chancery for its preventive interference. As in the caſe of *Brookbank* v. *Brookbank*, which is thus ſtated in the book called Equity Caſes Abridged (7). A. on the marriage of his ſon ſettled ſeveral lands in the following manner, viz. As to part to the uſe of himſelf for life, afterwards to the uſe of the ſon for life, then to the uſe of the firſt and other ſons of that ſon in tail, and for want of ſuch iſſue, to the uſe of the plaintiff, who was his brother, and his heirs; and as to other part of the lands, to the uſe of the ſon for life, and after to the uſe of the wife for her jointure, then to the firſt and other ſons in

(7) Eq. Ca. Abr. 168.

in tail, and for want of ſuch iſſue to the plaintiff and his heirs. The ſon and wife died without iſſue in the lifetime of A. and after their deaths A. got the ſettlement, and cut it in pieces; but the counterpart was entire, and in the hands of A.; and the bill was brought to diſcover it, and have it preſerved. The counterpart being confeſſed in the anſwer, the plaintiff obtained an order at the Rolls to have it brought into court, and a motion was made to have that order diſcharged, for that the remainder to the plaintiff was merely voluntary, and therefore he ought not to have any aid from a court of Equity. The court would not diſcharge the order, but directed the deed to be brought into court, there to remain, in order thereby to prevent A. from ſelling the eſtate from the plaintiff.

Neither can a man defeat his own voluntary conveyance by his ſubſequent will, even though his will contain an expreſs proviſion for the payment of his debts. This was determined in the caſe of *Killers* v. *Beaumont* (8), which was thus: Lady A. B.

(8) 1 Vern. 100.

was not revocable, and, therefore, having ſettled the lands, the teſtator had thereby diſabled himſelf to charge the premiſes by his will; and where A. on a quarrel with his eldeſt ſon, made a ſettlement of 100 *l. per annum* on his wife in augmentation of her jointure, and afterwards, being reconciled to his ſon, cancelled the deed, which was found ſo cancelled at his death, and the deed, on a trial at law, being proved, had been found good, though cancelled, a bill filed in the court of Chancery for relief was diſmiſſed by Lord Keeper Somers (11).

(11) Cited in Prec. in Chan. 235. as *Lady Hudſon's* caſe.

And though it is not to be diſputed but that a perſon making a voluntary conveyance may enable himſelf to defeat it by his own act, by reſerving a power of revocation; yet where (12) a man made a voluntary ſettlement, with power of revocation on the tender of a guinea, and afterwards ſettled the ſame lands to different uſes, but without tendering the guinea, it was ſaid by the Chancellor that the court might ſupply an informal or defective revocation, but could not make a revocation

(12) *Arundel* v. *Phillpot*, 2 Vern. 69.

vocation where there was none. And it was ſaid by the court, that it muſt be proved either that a guinea was tendered, or that the grantor declared ſhe intended to revoke the former ſettlement; for though it had not all the formalities and circumſtances mentioned in the power of revocation, yet if it appeared to be a ſober ſolid act, and done *animo revocandi*, it ſhould be carried into effect, but that *that* was not made out (*b*). It was then inſiſted, that

(*b*) The reader may ſee this caſe cited and approved by Lord C. J. Holt, in his great argument in *Bath* and *Montague*'s caſe, 3 Chan. Ca. 108. His Lordſhip obſerved, that the caſe came firſt into the King's Bench, thence into Chancery, and afterwards into the King's Bench again, where it had its period. It was proved upon the ſecond trial at law, that in the heat of provocation the guinea had been actually tendered, and conſequently that the revocation was good. We are to obſerve, however, that, in *Bath* and *Montague*'s caſe, the perſons, in whoſe favour the voluntary ſettlements were made, were on a foot of equality in reſpect to conſideration; but if the ſecond conveyance had been a ſettlement upon children, it ſeems that there would have been ground for inferring in equity the *animus revocandi*; and for this ſee the ſame great argument in *Bath* and *Montague*'s caſe. If, however, the ſecond conveyance had been only to a collateral

that the ſubſequent deed ſhould be taken as a ſufficient revocation, being of the ſame land, and made to different uſes and purpoſes; but this the court would not allow.

All theſe caſes were further confirmed by Lord Hardwicke in the caſe of *Boughton* v. *Boughton* (13), where a voluntary deed, without power of revocation, though kept and concealed in the grantor's poſſeſſion till his death, being without power of revocation, was not ſuffered to be ſupplanted by a ſubſequent will. And this and all the other caſes to *the ſame effect* were carefully diſtinguiſhed from the principle of the determination in *Naldred* v. *Gilham* (14), where a voluntary deed, being executed in favour of a nephew, without power of revocation, and being kept in the hands of the grantor, who was an old woman, ſomebody, on behalf of the

(13) 1 Atk. 625.

(14) 1 P. Wms. 577.

---

teral relation, as a nephew, upon the conſideration of natural love and affection, it appears by the *Lady Burgh*'s caſe, Moore 833. that no relief could be had in equity or at law againſt the firſt conveyance containing ſuch unexecuted power of revocation.

object

object of the ſettlement, had ſurreptitiouſly obtained an atteſted copy of it, after which the grantor had burned the original, and ſettled the eſtate upon another nephew; the firſt nephew's bill to eſtabliſh the copy of the firſt ſettlement was diſmiſſed with coſts; upon which the ſecond nephew, claiming under *his* ſettlement, brought his bill to have the atteſted copy given up, and had a decree in his favour becauſe the atteſted copy had been *indirectly gained.*

In the caſe laſt produced the *delinquency* of the party who was the object of the voluntary ſettlement vitiated and damned his title to aſſiſtance in equity; but there have been caſes wherein the oſtenſible limitations and proviſions of a voluntary deed, made without power of revocation, being clearly intended only to diſguiſe a ſecret truſt for the grantor, however void they might be as againſt a purchaſer, have been made to give way to a ſubſequent diſpoſition by the will of the grantor; ſuch is the tendency and principle of the caſes of *Ward* v. *Lant*,

(15) Prec. in Chan. 182.
(16) Ambl. 264.

Lant (15), and *Birch* v. *Blagrave* (16), where, in the firſt caſe the bond, in the laſt caſe the deed of ſettlement were ſubjected to the diſpoſitions of a ſubſequent will.

It was evident in the caſe of *Ward* v. *Lant*, juſt above-mentioned, that the grantor did not mean to part with the beneficial intereſt, for the conveyance was made ſecretly to a daughter, who had been already portioned, by way of putting the *legal* eſtate out of himſelf, to enable himſelf (as he miſtakenly conceived) to ſwear to his diſqualification to ſerve as *ſheriff of London*, though, being aware of his miſtake in time, he did not take the oath, but paid the fine; and ſo nothing was done in fraud of the law; there was therefore a truſt reſulting to the grantor, which paſſed by his ſubſequent will; ſo that in this particular claſs of caſes, it ſeems that a court of equity will give effect to a will, by means of a conſtructive truſt, where it is without effect at law. And in *Ward* v. *Lant*, above cited, where the voluntary bond was given to ſkreen the obligor from taxes, the principle

ciple of the deciſion reſted on the ground that equity would have relieved againſt the obligee, if ſhe had gotten the bond into her hands out of the poſſeſſion of the obligor who had never parted with it, and had put it in ſuit againſt him. The ſpecial purpoſe of making the bond, rendered it a truſt for the obligor himſelf, and the court decreed it to be ſet aſide as againſt the ſubſequent will. It ſeems an undiſputed propoſition, that whatever equitable intereſt a voluntary conveyance or bond leaves in the grantor or obligor, may paſs by a ſubſequent voluntary diſpoſition: as in the caſe of *Rand* v. *Cartwright* (17), where A. made a voluntary conveyance to B. and afterwards a mortgage of the ſame land, and the firſt deed, on a trial at law, was found fraudulent, and B. exhibited his bill to redeem the mortgage; it was decreed that though the deed to B. was fraudulent, as being voluntary, as to the intereſt of the mortgagee, yet that it was good to paſs the equity of redemption; for a voluntary deed is good, both in equity and at law, againſt the party making it and his repreſentatives. So if a deed be *unduly*

(17) 1 Chan. Ca. 59. 219.

obtained, ſo as that a bill might be brought in equity for relief againſt it by the party making it, the beneficial intereſt or equitable title will paſs (18) by his ſubſequent will; for, though it ſeems capable of being objected that the teſtator had nothing but a right to a remedy, which was not aſſignable, yet ſuch right is held to be in the nature rather of an equity of redemption than a bare right to an action, and is therefore aſſignable; and as the teſtator might have come into equity to be relieved againſt ſuch deed, ſo may his deviſees.

(18) *Blake v. Johnſon*, Prec. in Chan. 142.

Where two perſons claim under voluntary ſettlements or conveyances, the perſon deriving under the firſt had the eſtate at law, and ſhall hold it againſt the ſecond grantee both at law and in equity (19). Thus in the caſe of *Clavering* v. *Clavering* (20), where C. made a voluntary ſettlement of an eſtate, ſubject to ſome annuities, in truſt for his grandſon and his heirs, and ſeven years afterwards made another voluntary ſettlement of the ſame eſtate to the uſe of his eldeſt ſon for life, remainder to his firſt and other ſons in tail, with

(19) Vid. 3 Chan. Ca. 123.

(20) 2 Vern. 473. and ſee the caſe in Prec. in Chan. 235. ſtated rather differently as to circumſtances, but the ſame in principle.

with remainders over; and afterwards by will gave a conſiderable eſtate to his grandſon; although it was proved that C. always kept the firſt ſettlement in his cuſtody, and never publiſhed it, and that it was found after his death among his waſte papers; and that the latter deed was often mentioned by him; and that he had told the tenants, that the eldeſt ſon was to be their landlord after his death, yet the ſon could not be relieved againſt the firſt ſettlement. And again in the caſe of *Goodwin* v. *Goodwin* (21), where the plaintiff and defendant claimed by two ſeveral voluntary deeds, the court, after ordering precedents to be produced of caſes wherein a prior voluntary conveyance had been ſet aſide againſt a ſubſequent conveyance which was voluntary alſo, diſmiſſed the plaintiff's bill which prayed to have the ſecond voluntary conveyance eſtabliſhed againſt the firſt (*c*).

(21) 1 Chan. Rep. 92.

(*c*) But a difference ſeems to have been made in equity where the ſecond conveyance was for payment of debts. Vid. Vin. Abr. tit. Voluntary Conveyances. E. 1. G. 1. Toth. Tranſ. *Dom. Darcie* v. *Allerton.*

With reſpect to agreements and defective conveyances, it ſeems pretty well ſettled that courts of equity will not lend their aſſiſtance to carry them into execution, unleſs there was a meritorious conſideration *at leaſt* for making them; which rule is laid down in the caſe of *Coleman* v. *Sarrel* (22), by Lord Chancellor Thurlow in its greateſt extenſion, without any qualification in favour of agreements under ſeal; in which caſe his Lordſhip obſerved, "that wherever a deed is not ſufficient to paſs the eſtate out of the hands of the conveyer, ſo that the party muſt come *into equity, the* court has never yet executed a voluntary agreement. To do ſo would be to make him who does not ſufficiently convey, and his executors after his death, truſtees for the perſon to whom he has ſo defectively conveyed, and a court of equity has never done that." And the caſes ſeem in general to agree in eſtabliſhing the poſition, that where, upon a deed, only nominal damages, by reaſon of its want of conſideration, can be recovered at law, a court of equity will not afford to the party a more ſubſtantial relief (23). But though the mere circumſtance

(22) 3 Bro. C. R. 12.

(23) Vid. 1 Atk. 10. et vid. *Furſaker* v. *Robinſon*, Prec. in Chan. 475.

cumſtance of the agreement's being under ſeal ſeems not of itſelf ſufficient, without an equitable conſideration, to influence a court of equity to compel a ſpecific performance, yet where a man, by his voluntary *bond*, has made himſelf a debtor at law to a *certain* (*d*) amount, it appears that, although a real debt by ſimple contract will obtain a preference in payment, yet it is good in equity, if no creditor be thereby deprived of his debt, againſt an executor or adminiſtrator. To this effect decidedly was the opinion delivered in the caſe of *Lechmere* v. the *Earl of Carliſle* (24), by Sir Joſeph Jekyl, the Maſter of the Rolls; and in the caſe of *Williamſon* v. *Codrington*, Lord Hardwicke ſeemed to entertain correſpondent ſentiments (25). In thoſe caſes which were cited by the counſel in *Sarell* v. *Coleman*, in ſupport of the croſs bill (26), either the voluntary conveyance had ſupported itſelf upon a meritorious and equitable conſideration, or the relief againſt it had been ſought by

(24) 3 P. Wms. 222.

(25) 1 Vez. 514.

(26) 3 Bro. C. R. 14.

(*d*) And it ſeems that in courts of equity debts on bonds for the payment of ſums certain, are preferred in payment to demands on articles ſounding in damages; vid. 2 Vern. 272. *Whitchurch* v. *Baynton*.

a volunteer who ſtood only on a foot of equality; but in *Sarell* v. *Coleman*, the croſs bill prayed the ſpecific performance of a deed *merely* voluntary, and was diſmiſſed on that account. Where, indeed, an abſolute conveyance has been made of a ſubſiſting *equitable* eſtate, the court will perfect it though it be voluntary, for an equitable eſtate is transferrible, *qualecunque eſt*, without conſideration, as well as a legal eſtate, and every *ceſtui que* truſt, whether volunteer or not, is entitled to the aid of a court of equity, in order to avail himſelf of the benefit of the truſt, and his want of *conſideration* does not impeach his right to call for the legal eſtate (27). It was on this principle, probably, that in *Tudor* v. *Smayne*, cited above (28), where the huſband had diſpoſed of the wife's truſt-term, and a bill was filed by the aſſignee againſt the truſtees of the term and the wife to compel them to aſſign over the legal eſtate, the court decreed according to the prayer of the bill, and was not diverted by the arguments of the counſel for the defendants, who contended that, ſince if the huſband had been plaintiff, the court would not compel

(27) Vid. the caſe of *Leckmere* v. Earl of *Carliſle*, 3 P. Wms. 222. per Sir J. Jekyl; and 4 Vez. Jun. 354.

(28) Vid. 2 Vern. 270. et ſupra 300.

compel the truſtees to aſſign to him, without his making ſome ſettlement for his wife, the plaintiff who derived under the huſband ought not to be in any better condition.

In the caſe of *Williamſon* v. *Codrington*, before the ſettler was evicted, he had ſettled the eſtate by a formal conveyance to truſtees, and ſuch as would, it ſeems, have given the objects of that ſettlement, though volunteers, a right to the aid of equity to enable them to obtain the full benefit of the truſts in their favour, if nothing had happened to alter the eſtate; and though the ſettler was ſubſequently evicted and diſpoſſeſſed by ejectment, and afterwards received one thouſand guineas by way of compoſition for his claim, yet it appeared to the Chancellor as a plain caſe, that he did not mean to defeat the children of the proviſion originally deſigned for them, and it ſeemed to be on this ground principally that his Lordſhip decreed them a compenſation in part out of the aſſets.

What ſhall be regarded as a *meritorious* conſideration to induce the court to compel the ſpecific performance of agreements, it is not eaſy to reduce to any rule of univerſality; but it appears by the caſes, that where agreements reaſonable in themſelves are entered into to ſave the honour or peace of a family, or for ſettling diſputed boundaries, and thereby purchaſing mutual repoſe (29), courts of Equity have lent their aid in carrying them into effect. But where the meritorious conſideration is founded wholly on conſanguinity and natural affection, it ſeems to be conſidered as ſettled that the court will not grant its *ſpecific* relief to perſons not coming within the legal deſcription of wives and children, ſo that a grandſon or an illegitimate child has been holden not to come within the benefit of this privilege (30). It is true that the ſpecific performance of *marriage articles* has been decreed in favour of collaterals (31), but there the relief appears to be governed by certain ſpecial rules which were noticed by Lord Hardwicke, in the caſe of *Goring* v. *Naſh* (32), and have been ſhortly conſidered in a former part of this eſſay (33).

(29) 1 Atk. 5. *Stapilton* v. *Stapilton*, 1 Vez. 450. *Penn* v. Lord *Baltimore*.

(30) 2 Vez. 582 *Tudor* v. *Anſon*.

(31) Vid. *Vernon* v. *Vernon*, 2 P. Wms. 594.

(32) 3 Atk. 189.

(33) Vid. ſupra, 129. & ſeq.

There

There are caſes alſo of equitable predilection where the court will *judge* between *mere* volunteers, and will be moved to a deciſive interference without the attraction of a valuable or meritorious conſideration; as where it entertains an application by an heir to have his title diſencumbered by applying the perſonal eſtate in exoneration of the real: in which caſes the court has often given its aſſiſtance to effectuate the objects of mere voluntary claimants (34). The court alſo lends itſelf to the heir or deviſee who founds his claim upon an agreement of the anceſtor or deviſor to lay out money in the purchaſe of land, where the fund remains ſpecifically unaltered; for the rule of equity is, that money, covenanted to be laid out in land, is to be conſidered as land, and land articled to be ſold is to be treated as money; which rule reſts upon a rule more ancient and fundamental, *viz.* that what is agreed to be done for valuable conſideration is to be regarded as actually performed from the *moment the agreement is entered into.* But the aſſiſtance afforded to an heir or deviſee in ſuch caſes, does not, perhaps, form an exception to the

(34) 3 P. Wms. 322.

rule laid down in the caſe of *Coleman* v. *Sarrell*, above cited; for it is a principle of conſiſtency, rather than of predilection or choice between two claimants, by which the court is governed in its determination of ſuch conteſts between the real and perſonal repreſentatives. The maxim being once eſtabliſhed that money covenanted to be laid out in the purchaſe of land, is impreſſed with the character and qualities of real eſtate, and *that* not *partially*, *modally*, or *ſuſpenſorily*, ſo as to let in a diverſity of conſtruction with reſpect to future claimants, but by an ideal *tranſmutation* of the nature of the thing itſelf taking place at the inſtant of the execution of the articles, it ſeems that all the legal analogies flowing from ſuch a notion, muſt neceſſarily attach upon the ſubject though ſpecifically unaltered (*e*). And thus the heir

(*e*) This doctrine has been maintained by numerous and great opinions in all its plenitude of analogies and conſequences; but it was holden by Lord Somers, in the caſe of *Chicheſter* v. *Bickerſtaff*, 2 Vern. 295. that "though in many caſes money ſhall be conſidered as land, where bound by articles in order to a purchaſe, yet, while it

heir or deviſee who comes into a court of Equity to have the benefit of ſuch articles or agreement againſt the perſonal repreſentative, does not rely upon any equitable predilection, but upon the conſequences of a rule which could not be ſet up in the firſt inſtance without neceſſarily involving the admiſſion of a new order of claimants. And it ſeems to flow from the above doctrine, that if the property inſtead of remaining in the hands of the covenantor, be placed under the direction of truſ-

---

it remains money, and no purchaſe made, it ſhall be deemed part of the perſonal eſtate of ſuch perſon who might have *aliened* the land in caſe a purchaſe had been made;" which opinion was adopted by Lord Thurlow in *Pulteney* v. *Earl of Darlington*, 1 Bro. C. R. 238. *i. e.* that where a ſum of money is in the hands of one, without any other uſe but for himſelf, it will be money, and the heir cannot claim. But the caſes all agree that proof of intention in ſuch perſon, having the total intereſt, determines the queſtion. This, therefore, is a point in which the greateſt lawyers appear to have ſomewhat diſagreed. The reader may ſee all the caſes and principal points mentioned and referred to in Mr. Hargrave's argument in *Pulteney* v. *Darlington*, 1 Bro. 226. 2 P. Wms. 174. Mr. Coxe's note. 1 vol. Bac. Abr. edit. Gwillim, 113. note. 3 Atk. edit. Saunders, 254. note.

tees,

tees, the operation of the rule continues the ſame, for no truſtee can allege the want of conſideration in his *ceſtui que* truſt.

But the aſſignment of expectant intereſts reſting on contingencies or poſſibilities, falls within the above rule laid down in *Coleman* v. *Sarrell*, for they operate as *agreements* in the underſtanding of a court of Equity, and, therefore, according to the ſaid rule, the court will not aſſiſt them or give them effect, any more than they will decree a ſpecific performance of an agreement, without *valuable* or *meritorious* conſideration, or what, in the language of Lord Hardwicke, is called a conſideration in the *firſt* or *ſecond* degree. But, wherever a conſideration of either ſort has induced ſuch aſſignment, whether of a contingency in lands of inheritance, or of a poſſibility of a chattel real, courts of Equity will interpoſe their authority to carry them into effect, except where ſuch interpoſition would derogate from the valuable rights of creditors or purchaſers (35).

(35) See the caſe of *Wright* v. *Wright*, 1 Ves. 409. *Beckley* v. *Newland*, 2 P. Wms. 182. 187. *Robſon* v. *Trevor*, 2 P. Wms. 191.

THE END.

INDEX.

ACTION—pendency of, a badge of fraud, p. 575. et ſeq.

Action upon the caſe—extent of that remedy, 523. et ſeq.

Alimony—incidental power of the eccleſiaſtical court to decree alimony, 319. n. (*a*)

How far the juriſdiction of courts of equity in this reſpect extends, 320. n. (*c*)

Aſſets—a fraudulent attempt to alien real property will not prevent its deſcending as aſſets, 596. et ſeq.

Fraudulent, alienation of aſſets by an heir, 600. et ſeq.

Aſſignee—conveyance by, to avoid reſponſibility for the rent, 580. n. (*i*)

Aſſurances—operation of the ſtatutes on aſſurances of record, 205. et ſeq.

Bargain and ſale—nature of the conſideration neceſſary to ſupport a bargain and ſale, 88. 94.

Effect of the valuable conſideration in carrying the intereſt to perſons not included under it, 109.

Bills of ſale—diſtinction as to the operation of the ſtat. 13 El. c. 5. in caſes of poſſeſſion after conveyances of goods, between conditional and abſolute bills of ſale, 561.

Bonds—voluntary, 478. et ſeq.

Chari-

Charitable donations—p. 438.
Collateral—debts arising collaterally, 456. 460.
Colluſion—between an executor and purchaſer, 609. n. (*b*)
Between the executor and his teſtator's debtor. 609. n. (*b*)
Common law—extent of the relief at common law, and of the relief under the ſtatutes, 1. et ſeq.
Conſideration—vid. tit. *valuable* and *voluntary*—total want of conſideration a concluſive argument of fraud under the ſtatutes 13 and 27 Eliz. 73.
The conſideration within theſe ſtatutes diſtinguiſhed from the conſiderations to raiſe uſes upon the bargain and ſale, covenants to ſtand ſeized, and from that which is neceſſary to ſupport an aſſumpſit, 76. 84.
Colourable conſiderations, 373.
Equitable and juſt conſiderations are not ſufficient within theſe ſtatutes, 406. et ſeq.
Conſiderations *ex poſt facto*, 495. et ſeq.
Conſtruction—general rule of, 66.
Covenant—effect of a covenant for the indemnification of the huſband by truſtees for the wife in a deed of ſeparation, 344. et ſeq.
To ſtand ſeized to uſes, 87. et ſeq.
Efficacy of the deed, 89. n. (*f*) 90, 91.
Tenant in tail may convey a baſe fee by covenant to ſtand ſeized, 106. n. (*d*)
Natural affection to a baſtard no conſideration to raiſe the uſe upon a covenant, 107.
Covenant—where the uſe ſhall be carried to a ſtranger in blood, 107. n. (*e*)

Covenant—effect of covenants to ſtand ſeized, in articles, as giving them the operation of executed ſettlements, p. 226. et n. (*a*) 29. n. (*d*)

Covin—definition of, in Plowden's Commentaries, too narrow, 585. n. (*e*)

De jure alieno—conveyances by perſons entitled, 469.

Death—conveyance in expectation of, 444.

Decree—conveyance after, fraudulent, 579.

Donatio cauſâ mortis—not good againſt creditors, 442.

Equity—reluctance of the court of equity to execute agreements partially, 113, 114.

Importance of the conſideration in the courts of equity, 116. et ſeq.

Of the ſecondary or meritorious conſideration in the courts of equity, 118.

Of the dignity and weight of the valuable conſideration in the courts of equity, 119.

Courts of equity will lay down no other rule than is followed at law upon the conſtruction of theſe ſtatutes of El. 122.

In what caſes a court of equity will impoſe terms upon a huſband in favour of his wife in reſpect to his enjoyment and diſpoſition of her truſt-property, 278. et ſeq.

Where equity will impoſe terms upon the huſband's aſſignee, 291. et ſeq.

Why courts of equity will not relieve againſt marriage contracts, 373. n. (*d*)

Equitable relief in matters of fraud, 526. et ſeq.

Relief where the executor colludes with a purchaſer in the ſale of the aſſets, or with the teſtator's debtor, 609. n. (*b*)

Eſtoppel—its nature and force, 528. n. (*b*)

Executor de ſon tort—when the voluntary donee is conſidered as ſuch, 593. 45.

Forfeiture—fraudulent gift to defraud the king of his right by forfeiture remedied by 13 Eliz. c. 5. p. 2. 582, 3, 4.

A man ſhall not commit a forfeiture by covin, 590.

Fraud—the evidence of fraud within the ſtatutes 13 and 27 Eliz. compounded of two acts, 83.

Fraud in judgment of law, what meant by it in the books, 189.

Where the fraud is inferred from the deceitfulneſs of the truſt, and an inconſiſtent poſſeſſion, the whole tranſaction is infected and vitiated, 198, 199.

The fraud intended by the ſtatutes not abſolute, but relative and conſtructive, 450. 1. et n. (*a*)

Antipathy to fraud characteriſtic of the common law, 520. et ſeq.

A lawful title, if infected by covin, is vitious and unavailing, 521.

Remedies againſt fraud at the common law, 522. et ſeq.

All the partialities of the law give way to its antipathy to fraud, 522.

Badges of fraud, 546. 585.

Advice of Lord Coke, 547.

Fraud is not helped by circuity, 587.

Fraud may be paſſive as well as active, 589.

A man ſhall not commit a forfeiture by colluſion, 590.

Heir—covinous conveyances of the real aſſets by an heir, 601. et ſeq.

Huſband and Wife—as to the huſband's life-intereſt under the limitations of a ſettlement, 171, 2, 3, 4. 197.

Huſband

Huſband and Wife—whether the wife can, by any agreement between herſelf and her huſband, be endued with a legal capacity as a feme ſole to bind herſelf by her own contracts, p. 316. et ſeq.

Power of a wife in a court of equity over her ſeparate property, 321, 2.

How a huſband may become diſcharged from his liability to his wife's contracts for neceſſaries, 337. n. (*m*)

Ground and principle of that liability, 334. et ſeq.

Inadequacy—of price, 169, 170, 171.

Incapacity—of the donor, how far it repels the preſumption of fraud, 425 et ſeq.

Indemnity—the effect of an indemnity or collateral ſecurity taken by the purchaſer as an abdication of the protection of the ſtatute 27 Eliz. 167.

Infant—promiſe by an infant before marriage a good conſideration for a ſettlement after marriage within the ſtatutes, 244.

Intent to deceive—whether or not it muſt be particular as to the perſon claiming the benefit of the ſtatute, 46. et ſeq.

Intention—of the parties cannot affect or qualify legal proceſs ſo as to render that poſſeſſion ſafe which contradicts the intention of the law, 571.

Judgment—conveyance after, carries a ſuſpicion of fraud, 578.

Alteration as to the time of its relation, 607. n. (*e*)

Judgments by confeſſion—p. 489.
Juriſdiction—how far the queſtion of fraud under theſe ſtatutes belongs excluſively to a jury, 68. 73. n. (*e*)

King—title of the, defeats all colluſive tranſactions, 584.
Rex fallere non vult, falli autem non poteſt, 585.
Statute 27 Eliz. c. 4. binds the king, 543. 587.

Land—property in land not evidenced by the poſſeſſion of the title deeds, 550.
Leaſe for years—fraudulently aliened, conſidered as parcel of the alienor's eſtate at his death, 595.
Legacies—voluntary bonds will take place before, 485.
Leſſee—for years, a purchaſer within the ſtatute 27 El. 376, 7.

Maleficio—debts founded in, 456.
Marriage—conſideration of, 101.
Conſideration of, greatly reſpected at common law, 102. n. (*a*)
Reaſon of its title to be ranked among valuable conſiderations, 103. 105.
A good conſideration to entitle a purchaſer to the benefit of the ſtat. 27 El. 105. 367.
Extent of the conſideration of, 110. 123. et ſeq.
The opinions of Lord Hale and Lord Macclesfield, 124, 125. 137.
Courts of equity will decree execution in favour of collateral limitations to near kindred in marriage articles as againſt the repreſentatives of the ſettler, 129. et ſeq.

Merger

Merger—when effected or prevented by the operation of the ſtatutes, p. 381. n. (*g*)

Money—voluntary gifts of money, whether they are reached by the ſtatute 13 El. 420. et ſeq.

Mortgagee—a purchaſer within the ſtatute 27 El. 373.
How far poſſeſſion ought to follow a conditional conveyance, 555.

Natural love—no conſideration, but rather an argument of fraud where the party is indebted at the time of the conveyance, 16. 452.
Its force and privilege where the party is not indebted, 452.
What relations are embraced within the ſcope of this privileged conſideration, 453. n. (*b*)

Notice—purchaſer under the ſtatutes not affected by, 16.
Defence of this rule of conſtruction, 39. 45.
Where the caſe comes ſtrictly within the ſtatute, though it is diſputed in a court of equity, the ſame conſtruction as to the neutrality of notice prevails, 233.
Importance of notice when the purchaſer is before a court of equity as the general object of its patronage, 232, 3, 4.
Conſtructive notice in equity, 234. n. (*c*)

Payment of debts—how far a conſideration to ſupport a conveyance, 429. et ſeq.

Pleading—manner of, ſo as to take advantage of the ſtatutes, 596. et ſeq.

Poſſeſſion—when a badge of fraud, 197. 548. et ſeq.
How far poſſeſſion is evidence of ownerſhip within the ſtatutes of bankrupts, 553.
Poſſeſſion retained after execution, 571. et ſeq.

Powers of appointment—p. 472.
of revocation, 611. et ſeq.
Præmia pudicitiæ—428.
Preſumption—of fraud ariſing upon the ſtatutes, 189. 217.
Promiſe—conſideration to ſupport a, 93.
Parol promiſes before and after marriage, 481. n. (c)
Purchaſes—in the names of third perſons, 463. et ſeq.
Purchaſer—where he has no notice, his caſe is in ſome reſpects better in equity than at law, 228, 9.
How qualified to take advantage of the ſtatute 27 El. 367. et ſeq.
Whether it is neceſſary that he who conveys fraudulently and he who ſells the eſtate, ſhould be the ſame perſon, 377. et ſeq.
Whether a truſtee can be a *purchaſer*, 389.
Conuſee of a ſtatute is a purchaſer, 392.
The magnitude of the thing purchaſed is not reſpected by the ſtatute 27 El. 393.

Settlements—voluntary, 17.
Not invalidated by debts ſubſequently contracted except in particular caſes, ibid. et ſeq. 396.
Void againſt creditors where the ſettler is indebted at the time, ibid.
What ſort of voluntary ſettlement is the moſt favoured, 22.
Where voluntary ſettlements import by their inconſiſtency or incongruity the characters of fraud, they are void againſt ſubſequent as well as precedent debts, 27.
Partial validity of, under the ſtatutes, 112. et ſeq.

Settlements—where parents or other third perſons join in a ſettlement having an intereſt to part with, they may ſtipulate for collateral limitations, p. 139. et ſeq.

And a very ſlight intereſt will be ſufficient for ſuch purpoſe, 145. et ſeq.

To raiſe this acceſſorial conſideration of value for the collateral limitations in a ſettlement, there muſt be parties to contract, 153. et ſeq. 253. 260. 261.

As to the huſband's life-intereſt under the limitations of a ſettlement, 171, 2, 3, 4. 197.

Ultimate limitation to the right heirs of the huſband, 175. et ſeq.

Limitations embracing ſome of the objects of the marriage and extending beyond them, 180, 1, 2, 3.

Settlements after marriage generally void againſt purchaſers and creditors, 191. et ſeq.

Settlements after marriage grounded on prior agreements, 218. et ſeq.

Force of the recital of a prior agreement in a ſettlement after marriage, 236. et ſeq.

Parol agreement before marriage, 238. et ſeq.

The ſettlement after marriage muſt conform to the prior agreement, 245. et ſeq.

Settlements after marriage founded on freſh agreements, 249.

Settlements after marriage founded on new conſiderations, 253.

Settlements—ſupported by contracts between huſband and wife, p. 262. et ſeq.
Where the wife joins in barring her jointure, 262. et ſeq.
Effect of the wife's joining in levying a fine, 270. et ſeq.
Where a wife joins in a fine to bar herſelf of dower, 274. et ſeq.
Settlements after marriage of the wife's truſt-property, 278. et ſeq.
Settlements after marriage grounded on voluntary ſeparation, 316. et ſeq.
Settlement made previous to a ſecond, upon children by a firſt marriage, 348. et ſeq.
Clandeſtine and underhand agreements, 349. n. (*a*)
Statutes—13 El. c. 5. and 27 Eliz. c. 4. *of fraudulent* conveyances ſet forth, 1. n. (*a*)
Their general ſpirit and purview, 10. 16. 31. 41. 187. 191. 395. 405.
Difference of conſtruction in reſpect to the ſtatutes 13 and 27 El. 187. 395. et. ſeq.
Preventive efficacy of the ſtatutes of fraudulent conveyances, 188.
The diſpute upon the 27 El. muſt be between two perſons claiming upon legal executed conveyances, 235.
The ſtatute 13 El. compared with the ſtatutes of bankrupts, 491. n. (*a*) 551.
All ſtatutes againſt fraud beneficially conſtrued, 542. et n. (*a*)
How the ſtatutes work to the benefit of the party protected, 591. et ſeq.

Statutes and recognizances—p. 462, 580.
Statute 3 & 4 *W.* & *M. c.* 14.—explanation of, 603. et seq.
Stock—whether liable to creditors in courts of law or equity, 201. n. (*a*)
Surrenders—of copyholds, whether they are within the statutes, 447. n. (*b*)
Surety—whether a surety to whom a lease is made for his indemnification is a purchaser within the statute 27 El. 374. et n. (*f*)

Terms of years—husband's power of disposing of such as are held in trust for his wife, 299.
Tort—more favoured in law than covin, 521.
Trust—secret trusts, 173.
Settlements after marriage of the wife's trust property, 278. et seq.
The permanent trust, and the special directory trust at common law, distinguished, 313. n. (*f*)

Uses—origin of, 84.
How raised upon the bargain and sale, 86. et seq.
How raised upon the covenant to stand seized, 87. et seq.
Difference between the cases wherein they are to be raised and originated, and those wherein they are only to be guided and directed, ibid.
Valuable—import of the word, 15.
Valuable consideration, nature and effect of the, 66.
Valuable consideration, how constituted, 71. 74.

Voluntary—import of the word, 15, 16. 65. 82.
Its flexible sense, 70, 166. notes.

Voluntary—ſtrong conſtruction againſt voluntary conveyances by the early expounders of the ſtatutes, p. 13.

How far the voluntarineſs of a conveyance is evidence of the fraudulent intent within the ſtatutes, 61. et ſeq.

The 27 El. has been conſtrued with more ſeverity in this inſtance than the 13 El 62.

To what extent this difference of conſtruction is authorized, 395.

Voluntary deeds, how far binding upon the party and his repreſentatives, 641. et ſeq.

THE END.

London: Printed by A. Strahan, Law-Printer to His Majeſty.

CX ARO KWt
The constitutional history of
Stanford Law Library
3 6105 044 199 557
STANFORD UNIVE